

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA
RENO DIVISION

IN RE:)	CASE NO: 09-52477-GWZ
)	CHAPTER 11
)	
STATION CASINOS, INC,)	Reno, Nevada
)	
)	Thursday, May 27, 2010
Debtor.)	(9:20 a.m. to 11:06 a.m.)
)	(11:34 a.m. to 2:16 p.m.)
)	(3:20 p.m. to 7:55 p.m.)

1 MOTION BY JOINTLY ADMINISTERED DEBTORS STATIONS CASINOS, INC., ET AL. FOR ENTRY OF ORDER ESTABLISHING BIDDING PROCEDURES AND DEADLINES RELATING TO SALE PROCESS FOR SUBSTANTIALLY ALL OF THE ASSETS OF STATION CASINOS, INC., AND CERTAIN "OPCO" SUBSIDIARIES, DE #1235;

2 MOTION BY DEBTORS STATIONS CASINOS, INC. AND FCP PROPCO, LLC FOR ENTRY OF AN ORDER APPROVING SECOND AMENDMENT TO AMENDED AND RESTATED MASTER LEASE COMPROMISE AGREEMENT (11 USC 105(a); 363(b)(1); 365(d)(3); 365(d)(4)(B)(ii) & FRBP 9019), DE #1235;

3 MOTION BY JOINTLY ADMINISTERED DEBTORS STATIONS CASINOS, ET AL. FOR ORDER AUTHORIZING OPCO DEBTORS TO ENTER INTO RESTRUCTURING SUPPORT AGREEMENT WITH OPCO LENDERS (11 USC 105(a); 363(b); & FRBP 9019), DE # 1298

BEFORE THE HONORABLE GREGG W. ZIVE,
CHIEF UNITED STATES BANKRUPTCY JUDGE

Appearances: See next page

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Reno, Nevada; Thursday, May 27, 2010; 9:20 a.m.

(Courtroom and Telephonic Appearances)

Call to Order

1 **THE COURT:** Please be seated. Good morning. We have
2
3 a number of participants telephonically, and we have a list of
4 those. I am not going to require or ask that those that are
5 either monitoring or actually perhaps intending to do more,
6 identify themselves at this time. Only if you wish to address
7 the Court, I will ask you to identify yourself and the party in
8 interest that you may be representing.
9

10 Otherwise what I will do at this time is ask for
11 appearances of counsel that intend to participate in the
12 proceedings and argument today and tomorrow.
13

14 **MR. ARONZON:** Good morning, your Honor. Paul Aronzon
15 and Thomas Kreller, Milbank, Tweed. We also have another
16 partner, Daniel Perry. Between the three of us, we'll be
17 participating.

18 **MS. SMITH:** Jennifer Smith, Lionel, Sawyer and
19 Collins, Nevada counsel for the CMBS Lenders. Participating on
20 behalf of the lenders of the Sidley Austin firm will be Larry
21 Nyhan and Jeff Bjork.

22 **MR. QUSBA:** Good morning, your Honor. Sandy Qusba,
23 Simpson, Thacher, and Bartlett, counsel for Deutsche Bank Trust
24 Company Americas as OPCO agent.

25 **MR. GARZA:** Good morning, your Honor. Oscar Garza,

1 Gibson, Dunn and Crutcher on behalf of FCP PROPCO, LLC.

2 **MR. GOLDBERG:** Good morning, your Honor. Eric
3 Goldberg of Stutman, Treister and Glatt, for the independent
4 lenders.

5 **MS. STEINGART:** Good morning, your Honor. Bonnie
6 Steingart and Eric Winston, along with Brett Axelrod on behalf
7 of the Official Committee of Unsecured Creditors.

8 **MS. MARTIN:** Good morning, your Honor. Kristin
9 Martin of McCracken, Stemerman and Holsberry, representing the
10 Informal Committee of Station Employees.

11 **THE COURT:** Excuse me. Have you filed a type of
12 statement pursuant to Federal Rules of Bankruptcy Procedure
13 2019?

14 **MS. MARTIN:** No, we did not.

15 **THE COURT:** Then I will not hear you today.

16 **MS. MARTIN:** Okay.

17 **THE COURT:** I have reviewed your objection that was
18 filed to plan confirmation. That's Docket Number 1240. It was
19 the objection of the Informal Committee of Station Employees to
20 the joint plan of reorganization.

21 One, I don't even know if there is a committee. Two,
22 I don't know who would be on that committee. Three, they have
23 not been identified. Four, there has not been adherence to the
24 Federal Rules of Bankruptcy Procedure. Five, I've read your
25 points and authorities. I find them without any basis.

1 You cite to one unpublished opinion that we went to
2 the docket to get from Judge Clyde Jones, I believe it was, in
3 the Aladdin (phonetic) case, and candidly, you misrepresent the
4 holding of that opinion when you say that he required something
5 to do with the employees as they -- regarding the plan. That's
6 not what he did.

7 He simply said it might be one of the factors that he
8 would look at, and there's definitely no basis for the relief.
9 There's no collective bargaining agreement that I'm aware of.
10 Nevada is an at will state.

11 Clearly nobody, not a single party in interest in
12 this case, whether it be any of the debtors, any of the
13 creditors, secured or unsecured, have indicated that they would
14 want to do anything that would interfere with the retention of
15 the employees. In fact, the disputes are, who would hire them,
16 not who would be letting them go.

17 And it would only be in the event of a closure or a
18 failure to continue to operate, which no party in interest has
19 indicated that they want to occur, that would affect the
20 employees.

21 So, for those reasons, and I've looked at Section
22 1109. I've looked -- I'm well aware of what it provides. Your
23 -- whomever these people are, are not creditors. They're not
24 equity interest holders. Even under the broadest definition of
25 party in interest, which is very broad, and -- because I

1 believe in a totally participatory process, I just don't
2 believe that they have any standing to participate in today's
3 hearing.

4 Perhaps those defects can be solved before the
5 hearing on plan confirmation. But I actually have prepared a
6 memo, if you had followed up with additional authorities or
7 actually intended that you wished to participate today, because
8 I was concerned about the matter when I read it, and I wanted
9 to make sure that I understood the basis.

10 So, that gives you some indication how I look at it.
11 I appreciate your being here, and I think we're going to move
12 forward. Okay?

13 **MS. MARTIN:** May I respond, your Honor, briefly?

14 **THE COURT:** Sure. Go ahead.

15 **MS. MARTIN:** We did submit to the Court in advance of
16 our pleading. I can give you a date when I go back to my seat,
17 of a letter to your Honor identifying --

18 **THE COURT:** Letters to me do not -- are ex parte
19 communications. This Court will not accept -- I wouldn't -- I
20 have no idea if you sent a letter to me because my staff is
21 instructed to intercept all such correspondence and
22 communication, and either return it to the sender, and direct
23 it to the Office of the U.S. Trustee or appropriate parties in
24 interest. So I have no idea of that.

25 **MS. MARTIN:** Okay. Well, if it's --

1 **THE COURT:** And that would be the further indication
2 of not following proper procedure, candidly.

3 **MS. MARTIN:** Okay. Then if you -- we will refile
4 that in proper format. And it does identify who the committee
5 is, who -- the individuals who comprise the committee --

6 **THE COURT:** Take a look at the rule.

7 **MS. MARTIN:** -- as well as, as well as why we believe
8 we are a party in interest.

9 **THE COURT:** All that I ask is -- all that I ask is
10 compliance with the code and the rules.

11 **MS. MARTIN:** Okay. Thank you.

12 **THE COURT:** Thank you. I'd like to take care of a
13 few housekeeping matters so we don't interrupt the flow of the
14 argument.

15 I conducted an emergency hearing Tuesday afternoon I
16 believe it was dealing with some scheduling matters. At that
17 time, counsel were able to participate telephonically. I
18 appreciate their ability to do so. I know everybody is
19 extraordinarily busy. I thought last night I was back
20 practicing law and preparing for trial rather than -- so, I
21 imagine how hard all of you have been working.

22 The question that came up was an extension of certain
23 times and resetting certain hearings. I indicated that I
24 thought, at least based upon the -- found that I had to
25 consider that some of that made some sense, but I of course did

1 not require counsel to take a position until they had the
2 opportunity to confer with their clients.

3 So, I would just like to hear from counsel at this
4 time regarding those matters. It's really a -- what really
5 happened is that the hearing on the disclosure statement, which
6 is presently set for June 10th, it was proposed to be heard, I
7 think, on July 15th. I indicated that we would be able to set
8 aside two dates, July 15th and July 16th.

9 As I also indicated during that emergency conference,
10 this is a case where one day easily becomes two. So, I want to
11 make sure that we have sufficient time. So, that was the first
12 change.

13 Then the confirmation hearing had been set I think
14 for the 15th. Is that correct?

15 **MR. KRELLER:** That's correct.

16 **THE COURT:** And that would be moved to August 27th,
17 and I think -- what was that -- give me the date. When was the
18 sale date going to be?

19 **MR. KRELLER:** The option date, your Honor, the
20 proposed auction date was August 9.

21 **THE COURT:** That's correct. Let's deal with that
22 first so I get it chronologically set. And I indicated that I
23 would probably be able to have two days if necessary for that
24 as well. The 6th, the Friday -- Monday is the 9th.

25 And then the plan confirmation hearing would have to

1 obviously follow any auction, and we set that for the 27th.
2 And then I think it also had a date, the 27th must be a Friday
3 then?

4 **THE CLERK:** Yes, sir.

5 **THE COURT:** And -- because as I noted at that time,
6 my evidentiary dates in this court are Thursday, Friday and
7 Monday. And I thought that those times would be better, and I
8 think it probably solved one of the issues regarding a
9 complaint to the due diligence period. I think that
10 paraphrases what I discussed. I'd be glad to hear from
11 anybody.

12 **MS. STEINGART:** The committee has no objection to the
13 change in the dates that have been proposed by the debtors,
14 your Honor.

15 **THE COURT:** Well, let me see if I can shorten it.
16 Does anybody have any objection to those dates?

17 **MR. GOLDBERG:** Your Honor, I haven't had a chance to
18 confer with each of my clients about it, but we generally have
19 no objection. Obviously the disclosure statement hearing needs
20 to be moved, but we do think the additional time is helpful.

21 **THE COURT:** Anybody else? All right. I do, too.
22 And I think it's a reasonable approach. Frankly, more time for
23 others to do any due diligence if that is in fact what occurs.
24 It's always beneficial and provides additional time if there is
25 going to be an auction.

1 So, at this time, I will vacate the earlier dates.
2 We will set July 15th and 16th for the hearing on the
3 disclosure statement.

4 That leaves the issue of when objections should be
5 filed. Some have obviously been filed, at least one has. I
6 just dealt with that a few minutes ago.

7 **MR. KRELLER:** Your Honor, we have -- we actually have
8 a pending motion to approve the disclosure statement and
9 establish confirmation related deadlines. If you want to cover
10 -- if you want to go through dates and set them today, that's
11 fine. What I had contemplated was that at the disclosure
12 statement hearing we would have approval of this schedule.

13 **THE COURT:** Well, I need objections -- all I'm
14 setting right now is the deadline for objections --

15 **MR. KRELLER:** Objections to the disclosure statement.

16 **THE COURT:** -- to the disclosure statement.

17 **MR. KRELLER:** Okay.

18 **THE COURT:** I'll worry about --

19 **MR. KRELLER:** Thank you, your Honor.

20 **THE COURT:** -- I may not have to set any dates after
21 that, Mr. Kreller.

22 **MR. KRELLER:** Okay. I misunderstood, your Honor.

23 **THE COURT:** Okay. The deadline for the disclosure
24 statement had been June 10. I assume, you folks tell me where
25 you were in terms of preparing your objections.

1 **MS. STEINGART:** Well, your Honor, at this point, we
2 -- right --

3 **THE COURT:** I'm anticipating you and Mr. Goldberg's
4 plans will be objecting. I could be wrong, but I'm assuming
5 that.

6 **MS. STEINGART:** Yeah. So far. So far, but hope
7 springs eternally, your Honor.

8 **THE COURT:** Okay. Good.

9 **MS. STEINGART:** You know, at this point, we were at
10 a fairly nascent stage because, as I've discussed with
11 Mr. Kreller, we were expecting the filing of a fairly
12 substantially revised disclosure statement. Because the first
13 one that was filed was before any of the agreements now before
14 the Court.

15 **THE COURT:** Understood.

16 **MS. STEINGART:** So, we were at a nascent stage, and I
17 would ask the Judge -- the Court to, you know, to set, you
18 know, a time that gives us a period after Mr. Kreller tells us
19 we're going to get those revisions to do our response.

20 **THE COURT:** Well, I will tell you, any revisions -- I
21 can -- I'm going to set some deadlines. Okay?

22 **MS. STEINGART:** Okay.

23 **THE COURT:** We know what the -- what have been called
24 the plan facilitation motions and documents are. That's what's
25 in front of me today. I already resolved one of the earlier

1 ones with the extension of exclusivity.

2 We've got, of course, the PROPCO support agreement is
3 in front of me because the debtors are parties to it. The OPCO
4 restructuring agreement is part of the motions before me today.
5 The bidding procedures are part of the matters before me today,
6 together with the second amended compromise of the master
7 lease, and those are what are referred to as the plan
8 facilitation documents.

9 The -- obviously they can be attached and referred to
10 in the disclosure statement. I don't think we need to have
11 hundreds of pages of the disclosure statement. I think that we
12 can refer to them, the parties, and make them available to
13 anybody that's interested.

14 Moreover, the hearings that were conducted May 4th,
15 and 5th, and today, together with all the discovery, people
16 still don't have -- hypothetical investors are not aware of
17 information at this point. I don't know when they would ever
18 be, candidly.

19 The other objections I assume will be on a more
20 substantive basis on how they'd be told if the plan's patently
21 not confirmable.

22 I will not conduct, just so everybody understands, I
23 do not conduct (indiscernible) confirmation hearings on
24 hearings on disclosures. Really, that's not the point. And I
25 also understand that if there are objections that can go to

1 confirmation issues that are appropriately considered at the
2 time.

3 So, when -- I think Ms. Steingart is right. I think
4 the disclosure statement has to be amended.

5 The bidding procedures have changed, for example. I
6 mean, somebody finally listened to Mr. Genereau (phonetic) and
7 said, "Oh, we forgot to talk about that \$48 million worth of
8 credit." So, I did notice that.

9 So, I think that I need to know from you how much
10 time you need.

11 **MR. KRELLER:** Your Honor, you're absolutely right.
12 The bidding procedures have been modified. The master lease
13 compromise agreement. Obviously, there's all sorts of moving
14 parts that hopefully have settled.

15 In terms of, and I agree with Ms. Steingart. It
16 seems to me that the objection deadline should be keyed off
17 when they will see the revised documents.

18 **THE COURT:** Oh, I -- there's no point to doing it
19 otherwise.

20 **MR. KRELLER:** We have, you know, obviously I think
21 that they'll need to reflect the developments of what comes out
22 of today and tomorrow.

23 **THE COURT:** Of course.

24 **MR. KRELLER:** Your Honor, I -- my proposal on that
25 would be that the plan and disclosure statement as revised be

1 filed two weeks from tomorrow, which I believe puts us at the
2 18th.

3 **THE COURT:** Well, that would be June 11th, would it
4 not?

5 **MR. KRELLER:** It would be June 11th, your Honor. I
6 guess actually that's probably a little tight. If the hearing
7 is the 15th, if we shoot for the 5th of July -- July 15th, if
8 we have the plan and disclosure statement roughly 30 days
9 prior.

10 **THE COURT:** Monday, the 14th for revisions, and the
11 filing of amended disclosure statements.

12 **MR. KRELLER:** You've made the 12th and the 13th a fun
13 weekend for us all, your Honor.

14 **THE COURT:** Well, I -- join me. Well, if Tuesday's
15 better, I don't have a problem with one day.

16 **MS. STEINGART:** I don't have a problem with one day
17 either, your Honor.

18 **THE COURT:** Neither do I. June 15th is fine.

19 **MS. STEINGART:** Right. And under the schedule as it
20 is just now, our objections would be due on July 1st, and we
21 have no problems with that date, your Honor.

22 **THE COURT:** Let me take a look.

23 **MS. STEINGART:** That's 14 days before the hearing.

24 **THE COURT:** Yeah, I know. And I can shorten that,
25 or --

1 **MR. UNIDENTIFIED:** Lengthen it.

2 **THE COURT:** I'm -- because I want -- I'm going to
3 provide an opportunity at response --

4 **MS. STEINGART:** Right.

5 **THE COURT:** And, as usual, I need to read it. I will
6 tell you that I do not return to court until the 9th. You know
7 where I'll be on the 10th.

8 All right. Objections by the 1st. Replies by the
9 8th. That way my staff has them all by the 9th, and I can work
10 the weekend on it.

11 Would you please prepare a scheduling order?

12 **MR. KRELLER:** We will, your Honor.

13 **THE COURT:** Thank you.

14 **MR. KRELLER:** And we'll also provide notice of these
15 dates as well.

16 **THE COURT:** Yes, please. Actually, an amended notice
17 of the dates will be sufficient. We don't need an order. Just
18 do an amended notice. The order on the record today is
19 sufficient. Just do the notice. Everybody is aware of it.

20 **MR. KRELLER:** We will do that, your Honor.

21 **THE COURT:** Thank you. That takes care of that
22 issue. And now I'm going to make sure that the evidentiary
23 record is complete.

24 I have reviewed the exhibit list from the hearings
25 conducted on the 4th and 5th. I've reviewed the transcript,

1 and I have those with me by the way, of May 4th and 5th. So,
2 I've read those.

3 I've read and I've reviewed the exhibits. And I have
4 received two volumes of additional exhibits, most of which have
5 been stipulated to by the parties. There is one or two errors
6 that I need to talk about.

7 The exhibits that were submitted, and I appreciate
8 counsels' efforts in that regard, indicate that certain
9 exhibits perhaps had been admitted, and they haven't been. And
10 those were Exhibits 14 and 15. They were not admitted. And
11 it's indicated here that they were. And we've checked the
12 transcript.

13 **MS. UNIDENTIFIED:** Right. I apologize, your Honor.

14 **THE COURT:** Okay.

15 **MS. UNIDENTIFIED:** And actually --

16 **THE COURT:** Well, that's right. I should -- because
17 I sat down, I said I know I didn't, because when I stopped you
18 from asking -- reading it into evidence --

19 **MS. UNIDENTIFIED:** Right.

20 **THE COURT:** -- because it wasn't admitted, the
21 transcript indicates that they were admitted. The transcript
22 is wrong. And I would point that out. And one is -- 14 is an
23 e-mail, and 15 is also an e-mail.

24 **MS. UNIDENTIFIED:** Yes, it is, your Honor.

25 **THE COURT:** And so they are not in evidence. Those

1 are the only two items that were not in evidence.

2 The deposition transcripts are not admitted. They're
3 simply marked. The evidence is what's contained in the
4 transcripts.

5 I have read all the depositions. I pay particular
6 attention to the designations, but I found some designations
7 ended in a portion of the answer without the whole answer. So,
8 I decided that I would read the whole answer.

9 And then I would read generally questions and answers
10 before, because many of these depositions I did not have the
11 benefit of having all the exhibits, so I had to kind of figure
12 out what was going on. And most of them I'm aware of what they
13 were, and the different reports, and the bullet points. So, I
14 understood what was going on.

15 So those deposition transcripts which are at the end
16 of the books of evidence will be marked but not admitted. Is
17 that understood?

18 Your designations also are not evidence, but they can
19 be marked. But I will not consider them to be evidence. Once
20 again, what the witness said is the evidentiary portion.

21 There were some objections. I'd like to just deal
22 with those right now since we're dealing with the evidentiary
23 portion.

24 There is an objection to Exhibit 33. "Hearsay to the
25 extent it is offered for the truth of the matter."

1 I went through it and I didn't think it was being
2 offered for the truth of the matter asserted. I thought it was
3 just being offered to show that part of the negotiation that
4 occurred. I'm not sure it's being offered for the truth of
5 what's contained. I --

6 **MS. STEINGART:** That's precisely correct, your Honor.

7 **MR. PERRY:** It's a little bit difficult, your Honor,
8 because I don't, you know, we haven't seen how they're going to
9 use it in the hearing. So, if it's not being offered for the
10 truth, that's fine. We'll withdraw the objection.

11 **THE COURT:** Well, they just told me it's not being
12 offered for the truth.

13 **MS. STEINGART:** It's not being offered for the truth.

14 **MR. PERRY:** That's fine.

15 **THE COURT:** Then I'm overruling the objection.

16 The debtors objected to Number 40 on lack of
17 foundation. I don't know what it is. I would -- I'm assuming
18 these came -- I look at the Bates stamps, and I'm assuming that
19 the Bates stamps indicate the source of the document.

20 **MS. STEINGART:** Yes, your Honor.

21 **THE COURT:** A and M stands for Alvarez and Marsal.
22 Is that correct?

23 **MS. STEINGART:** Correct, your Honor.

24 **THE COURT:** So this is something out of probably
25 Mr. Caruso's (phonetic) file?

1 **MR. UNIDENTIFIED:** Your Honor, this was produced to
2 us by Alvarez, so whether it's from Mister --

3 **THE COURT:** And was it used during Mr. Caruso's --

4 **MR. UNIDENTIFIED:** Deposition? Yes.

5 **THE COURT:** -- deposition. And it's his notes
6 regarding conversations with Mr. Kreeger (phonetic)?

7 **MR. WINSTON:** Mr. Caruso testified that it wasn't his
8 notes, but the notes of one of his teammates.

9 **THE COURT:** Sounds to me you've got a foundational
10 problem.

11 **MR. WINSTON:** Your Honor, Eric Winston, for the
12 committee.

13 **THE COURT:** Sure.

14 **MR. WINSTON:** To some extent this is putting the cart
15 before the horse on Alvarez and whether it's an expert
16 testimony or not, but let's assume for a second --

17 **THE COURT:** Well, no. I can deal with that. I'll
18 deal with the claim -- Alvarez isn't being offered as an
19 expert. Alvarez is -- I know, I understand I think what the
20 nature of the Alvarez/Caruso testimony is. Not an expert, but
21 there's a citation I think that's wrong in the objection, by
22 the way. But that's okay.

23 And I don't consider him to be an expert. He -- I
24 look at his testimony as indicating the basis upon which the
25 steering committee negotiated the terms of the agreement.

1 That's all. And I understand the challenges to that. That's
2 fine.

3 I know he's not an appraiser. I know he didn't do
4 evaluations. I know other people in this firm provided him
5 information. He used it all to provide advice to his client,
6 and that was used in the negotiations. That's all it's for,
7 and I'll make a determination on how much weight to give it.

8 That's sort of a clue how I look at your objections.

9 **MR. WINSTON:** Fair enough. And if we -- I don't want
10 to get ahead of myself, but there's a different issue if it's
11 not treated as an expert, because we -- we completely agree
12 he's not an expert, but --

13 **THE COURT:** But you see, I don't also consider him to
14 be a lay witness that's offered me an expert opinion, so when
15 you get into what is it, 701(d) I believe. I think that was
16 the cite, but it's -- you can't use a lay witness when you
17 can't get him qualified as an expert. I don't consider his
18 testimony to be that.

19 **MR. WINSTON:** Okay. Well --

20 **THE COURT:** And I will not consider it as such.

21 **MR. WINSTON:** Fair enough. I still think, and, you
22 know, I do apologize that we are now moving somewhere else.

23 **THE COURT:** That's okay. These all fit together.

24 **MR. WINSTON:** Sure. That's why I thought it would be
25 putting the cart before the horse.

1 If it's lay testimony, lay opinion under 701 --

2 **THE COURT:** I didn't say it was opinion.

3 **MR. WINSTON:** Well, that's what I think the report is
4 offered for. And in fact he says in Paragraph --

5 **THE COURT:** The report.

6 **MR. WINSTON:** -- his report, which is what we've
7 objected to, including Paragraphs 5 and 6.

8 **THE COURT:** It says, what --

9 **MR. WINSTON:** This is the A and M report that's
10 attached to his declaration.

11 **THE COURT:** Oh, I see. All right.

12 **MR. WINSTON:** All right. And that's the problem,
13 because --

14 **THE COURT:** I already admitted his declaration.

15 **MR. WINSTON:** Well, you admitted his declaration in
16 connection with our motion to strike it as untimely. I don't
17 think your Honor said at that hearing, in saying, you get to
18 depose him, that we've lost all ability to say that the
19 testimony or the report itself had evidentiary defects. That
20 would be --

21 **THE COURT:** Oh, I -- I understand that. All right.
22 Fine.

23 **MR. WINSTON:** That's why we care, because at the end
24 of the day, if all Alvarez or Mr. Caruso was testifying was, I
25 got hired to assist the agent to -- in their negotiations,

1 that'll be fine. That's what we've not objected to in his
2 declaration. What we have objected to is his statement that "I
3 have concluded that my report indicates indicative values that
4 are fair and reasonable." And if you -- and I'll come back --

5 **THE COURT:** Whatever indicative values means.

6 **MR. WINSTON:** Your guess is as good as mine. I don't
7 know what it means. I agree with you it's not expert
8 testimony, so if it's not under 702 --

9 **THE COURT:** Okay. I'll deal with that --

10 **MR. WINSTON:** All right.

11 **THE COURT:** I will tell you --

12 **MR. WINSTON:** No, I -- there's a reason --

13 **THE COURT:** -- I'll hear argument. I'll be glad --
14 I've studied that objection. I'll get to that in a moment.

15 **MR. WINSTON:** Okay, but now --

16 **THE COURT:** But what are -- what is Exhibit 40?

17 **MR. WINSTON:** All right. Now, let's go to Exhibit
18 40. These are notes that were prepared by, according to
19 Mr. Caruso, his colleague, Ed McDonough (phonetic), in
20 connection with their work.

21 **THE COURT:** Yes.

22 **MR. WINSTON:** He clearly had relied upon
23 Mr. McDonough's work --

24 **THE COURT:** No question.

25 **MR. WINSTON:** -- right -- no question. They, in the

1 report, the Alvarez report, they cite to a conversation with
2 Mr. Kreeger as the basis for the \$50,000 per location
3 replacement cost for the trademark locations for the
4 restaurants and bars.

5 Exhibit 40 has the same exact reference to \$50,000
6 per replacement cost for those restaurants and bars. So, from
7 a foundational standpoint, and he also testified they've had
8 numerous conversations with Mr. Kreeger. From a foundational
9 standpoint, if Mister -- if we can't depose Mr. McDonough, and
10 Mr. Caruso is saying, "Well, this is what my team did and I
11 supervised them," we've established foundation.

12 **MR. PERRY:** We've also interposed a hearsay
13 objection, your Honor, to the extent that they're relying on
14 the truth of Mr. Kreeger's statements. They actually did that
15 in their brief.

16 And it's an issue for us because Mr. Kreeger's
17 testimony was contrary to the way they characterized what he
18 said in this document. It's double hearsay, the document, as
19 to Mr. Kreeger's purported statements.

20 So, we actually feel strongly that to the extent they
21 are --

22 **THE COURT:** But this is one of McDonough's
23 statements. I would not have a problem, but this is McDonough
24 telling Caruso what Kreeger told him. And that -- I think
25 that's too extenuated.

1 I think I'll sustain the objection. I think the
2 point's already made on the \$50,000. I read that in your
3 brief. I -- right. I don't think that there's -- that you'll
4 suffer any disability in making your argument.

5 **MR. WINSTON:** I'm not concerned about the disability
6 in making the argument. I'm concerned about the foundational
7 point, which I think we've covered.

8 Now, let me respond to --

9 **THE COURT:** No. That's fine.

10 **MR. WINSTON:** Let me respond to hearsay.
11 Mr. Kreeger's statements are party upon admissions. The
12 question is whether this A and M report that characterizes
13 those statements would also either be excepted from hearsay or
14 not qualify as hearsay at all.

15 A and M is an agent of the OPCO lender. They are a
16 party to the OPCO plan support agreement.

17 **THE COURT:** Well, let me say this. Let me cut this
18 short. I thought about what you just said, and I just
19 rethought.

20 You know, if I'm going to, and as you -- as I've
21 already indicated, unless I change my mind of my preliminary
22 conclusion, I'm probably going to rely on the Caruso
23 declaration with the report. I'll give it whatever weight I
24 determine is appropriate.

25 He clearly relied on the work of his associate, and

1 part of that work were these reports that he received, so it
2 seems fair to me if I'm going to listen to it from one side, I
3 should listen to it from another side.

4 So, I'm going to overrule the objection. It'll come
5 in and then I'll make a determination on how much weight to
6 give it.

7 **MR. PERRY:** Thank you, your Honor.

8 **THE COURT:** Now, the next item is -- that is a
9 foreshadowing by the way.

10 **MR. UNIDENTIFIED:** I --

11 **THE COURT:** Okay.

12 **MR. UNIDENTIFIED:** -- completely understand.

13 **THE COURT:** The next item is 43. Is this the same --

14 **MR. WINSTON:** It's going to be the same issue.

15 **THE COURT:** I'm going to overrule the objection on
16 the same basis.

17 Sixty-two. I didn't understand this. Can you -- can
18 somebody explain to me the nature of this objection?

19 **MR. PERRY:** It's a -- I don't really understand what
20 the document is. It appears to be --

21 **THE COURT:** Well, that's why I'm asking you.

22 **MR. PERRY:** Yeah. I -- well, that's sort of the
23 nature of the objection. It's a foundational objection. It's
24 somebody ran a patent search somewhere. I don't know who ran
25 it. I don't know what the parameters of the search were.

1 Under Rule 901, they have the ability to get
2 compilations of evidence in, but there's got to be some sort of
3 foundation laid.

4 **MR. WINSTON:** Your Honor, I will represent to the
5 Court our firm ran the search on the U.S. Patent and Trademark
6 Office website. We input the patent numbers, and it spits that
7 out.

8 **THE COURT:** What's it for? What is the purpose?

9 **MR. WINSTON:** Oh, it's -- what's the --

10 **THE COURT:** What's the relevance of this?

11 **MR. WINSTON:** -- what's the relevance?

12 **THE COURT:** Yeah.

13 **MR. WINSTON:** Okay. Well, the relevance is when we
14 get to the arguments on whether the patents are valuable or not
15 due to their age, because one of the things that Mr. Kreeger --

16 **THE COURT:** Mr. Kreeger said they had no value.

17 **MR. WINSTON:** They have no value. One of the things
18 that is argued is part of the reason why they have no value is
19 they're 12 years old.

20 **THE COURT:** Yes.

21 **MR. WINSTON:** In response to that, and this is why we
22 put this in. Those patents have been cited by numerous
23 subsequent patents, and when you get to Exhibit 60 and 69,
24 which are secondary authorities, the more a patent is cited, it
25 is perceived to be more valuable.

1 So we're demonstrating to the Court that these three
2 patents that have been put into evidence to which there is no
3 objection --

4 **THE COURT:** Is there any lack of trustworthiness in
5 the search that was conducted?

6 **MR. WINSTON:** I have no idea. I mean, counsel is
7 representing the nature of the search --

8 **THE COURT:** I'm going to reserve ruling on this until
9 I understand how the search was conducted. I just --

10 **MR. WINSTON:** Okay. Again, all I can represent to
11 the Court is we just sat there, went to the website, and put in
12 the numbers.

13 **THE COURT:** I'll wait -- let me wait to -- I'll
14 revisit this at the time of argument, because I'm not sure how
15 critical this is.

16 **MR. WINSTON:** Okay.

17 **THE COURT:** Go ahead. And then there is 68.

18 **MR. WINSTON:** If I can deal with 68 and 69
19 together because they go together.

20 **THE COURT:** Please. They are. Yes.

21 **MR. WINSTON:** This is just merely to assist the
22 parties. These are secondary authority law or the articles.
23 This is just -- rather than, I'm not putting it in as evidence.

24 **THE COURT:** Good.

25 **MR. WINSTON:** It's like this. When you cite

1 sometimes to like a court order, you can't easily access it,
2 but I can talk about it. This way, you put it as an appendix.
3 We just did it for ease for the parties.

4 **THE COURT:** Okay. They're simply marked for
5 identification. They're not going to be admitted.

6 **MR. WINSTON:** No.

7 **THE COURT:** Okay. Seventy-one.

8 **MR. WINSTON:** I think the next one is actually 70.
9 Seventy-one --

10 **THE COURT:** I thought it -- oh, 68 and 69 are just
11 a --

12 **MR. WINSTON:** Yeah.

13 **THE COURT:** -- seventy is also a hearsay objection.

14 **MR. WINSTON:** And just to -- I'm sorry.

15 **THE COURT:** And, you know, it is. It's hearsay.
16 It's a newspaper story.

17 **MR. WINSTON:** It'd be -- the newspaper story is
18 hearsay. The statement of course is a party upon admission.
19 It's the problem that the newspaper story --

20 **THE COURT:** How do I know it's an accurate statement?

21 **MR. WINSTON:** Well --

22 **THE COURT:** It's not under oath. I was a reporter.
23 I was a -- my degree is in Journalism. I assume that they did
24 a good job, but I'm not going to admit a newspaper story
25 without authentication.

1 **MR. WINSTON:** All right. Your Honor, let me try my
2 best to respond. In fact, I -- I understand the humor because
3 I've been misquoted --

4 **THE COURT:** It wasn't humor.

5 **MR. WINSTON:** I've been misquoted by reporters even
6 in this case.

7 **THE COURT:** I mean --

8 **MR. WINSTON:** It doesn't -- it's not surprising. But
9 I do want to respond both in terms of the hearsay objection and
10 then another purpose.

11 **THE COURT:** Please.

12 **MR. WINSTON:** The Ninth Circuit in Larez versus City
13 of Los Angeles (phonetic), and this is 946 F.2d 630, 1991 case,
14 held that the residual hearsay exception can apply to newspaper
15 stories if there's trustworthiness.

16 **THE COURT:** Eight zero seven. Rule 807.

17 **MR. WINSTON:** I'm sorry -- 807. I apologize. Eight
18 zero seven.

19 **THE COURT:** It was a Rule 807 though, wasn't it?

20 **MR. WINSTON:** Yeah. It's 807. I apologize.

21 **THE COURT:** Yeah.

22 **MR. WINSTON:** And our point is this. There's already
23 been admitted another newspaper article, Exhibit 46, which is
24 -- this is the one by Ms. Benson (phonetic) with respect to the
25 land that sold in February 2002.

1 **THE COURT:** Where everybody was stunned and shocked
2 at the huge price?

3 **MR. WINSTON:** Stunned and shocked, \$11 million per
4 acre.

5 **THE COURT:** Yeah, I read it.

6 **MR. WINSTON:** You read it. Okay. Well, from a
7 residual hearsay exception perspective, there's no indication
8 that the statement itself was untrustworthy or the newspaper
9 article was untrustworthy.

10 Now, they can disagree with it, and you can give it
11 -- you could ascribe it little weight because it is a newspaper
12 reporter, but I still think it falls within -- under the
13 residual hearsay exception.

14 And if I'm wrong about that --

15 **THE COURT:** Don't you have to provide notice that
16 you're going to use that section?

17 **MR. WINSTON:** That's what the rule does provide, and
18 in this particular case, I would think that a couple days
19 notice has been sort of par for the course.

20 **THE COURT:** Okay.

21 **MR. WINSTON:** I mean they clearly had enough time to
22 identify it as --

23 **THE COURT:** I have to -- I have to determine that the
24 statement is offered as evidence of a material fact. What --

25 **MR. WINSTON:** What material fact? It I think

1 contradicts the statement that they say player tracking
2 stations at Stations Casinos are not valuable because they can
3 be replaced by off the shelf systems.

4 **THE COURT:** But in fact, Mr. Kreeger, I think, said
5 the IGT system was probably as good.

6 **MR. WINSTON:** That's what he said.

7 **THE COURT:** Yeah.

8 **MR. WINSTON:** So something from May of this year from
9 the chief operating officer saying how important these things
10 are to their operations. I mean, the point being --

11 **THE COURT:** Wait a minute.

12 **MR. WINSTON:** -- they get to stick the card in and
13 learn all this stuff. That's their patented player tracking
14 system.

15 **THE COURT:** I know what tracking systems are. Yeah.
16 "The statement is more probative on the point for which it is
17 offered than any other evidence which a proponent can procure
18 with reasonable efforts."

19 **MR. WINSTON:** All right. So how do I respond to that
20 one, because I figured you would ask.

21 **THE COURT:** Yeah. How do you do that?

22 **MR. WINSTON:** This came up in Redirect on
23 Mr. Kreeger's deposition. Remember, the way these depositions
24 were set up is we moved to strike them or continue, you gave us
25 the continuance. And you said you can depose them, but that

1 wasn't going -- we were never going to have the opportunity to
2 cross examine them in front of your Honor. You weren't going
3 to be able to see their candor and their demeanor. You weren't
4 going to be able to ask them questions like you did on May 4th
5 and May 5th.

6 **THE COURT:** I don't think I ruled that way. I think
7 I was told that was what happened --

8 **MR. WINSTON:** Well, I --

9 **THE COURT:** -- because then I had a conference with
10 counsel after the hearings asking how long it was going to
11 take, and I was told it probably would be done by deposition.
12 I looked at the transcript. I don't think I ordered it. I
13 said that it could be done that way, but, anyway, go ahead.

14 **MR. WINSTON:** All right. Well, I don't want to
15 misrepresent what your Honor said.

16 **THE COURT:** Because I would never preclude anybody
17 from ever examining any witness in this courtroom. I don't
18 think I've ever done that.

19 **MR. WINSTON:** Okay. All right. Well, I certainly
20 don't want to misrepresent what the Court said, so I -- let me
21 back off on that.

22 As I said though, this came up in Redirect after we
23 had already done our Cross Examination via deposition. And in
24 Redirect, they, you know, asked the questions that they asked,
25 and they had very lengthy narratives. And that's to be

1 expected when you do Redirect in a deposition.

2 But we had no opportunity thereafter other than to go
3 search around for whatever documents we can find that would
4 impeach his credibility.

5 So, if you're not going to admit it under the
6 residual hearsay exception, I think it still falls under Rule
7 613(b) to -- sorry, 607 and 613(b) to impeach his credibility.

8 So, I think we -- this was the best we could do under
9 the circumstances, but if you're going to overrule that then we
10 at least can impeach his credibility.

11 **MR. PERRY:** Well, first of all it's not impeachment,
12 your Honor. This is a newspaper article which talks about
13 player tracking systems across the strip, which is precisely
14 our point. There's quotations from a Boyd officer about air
15 player tracking systems.

16 Mr. Kelley (phonetic), just so it's in the record,
17 says:

18 "We wanted to be able to understand our guests more
19 through technology. When you get a card and put it
20 in the slot, you learn an awful lot about what
21 players like and they don't like. That's -- you can
22 do that with an off the shelf system. You can do
23 that with our system."

24 It's not impeachment. They could have offered this
25 in Mr. Kreeger's deposition. They didn't. It's also true of

1 Mr. Kreeger's statements, Exhibit 40, which you let in. They
2 didn't cross examine him on any of this stuff. This is all --

3 **THE COURT:** That's right.

4 **MR. PERRY:** -- eleventh hour.

5 **THE COURT:** So I'll make a determine how much weight
6 to give it.

7 **MR. PERRY:** It's not impeachment. If you want to let
8 it in, it is hearsay.

9 **THE COURT:** You know, I've read the article. And you
10 both have cited authority for the proposition, primarily --
11 this is a bench trial. I think that the Court is capable of
12 being able to separate the wheat from the shaft, and I'm not
13 sure it gets to a material point, but if this was in front of a
14 jury, you'd lose.

15 But I'm going to allow it in and I'll make a
16 determination how much weight to give it. I've always -- I
17 never really liked that when judges did it to me, but I think
18 we've spent about as much time as this particular exhibit
19 deserves anyway.

20 **MR. WINSTON:** Fair enough, your Honor. And I can at
21 least report we have some good news for 71. We have actually
22 voluntarily withdrawn that before your Honor even took the
23 bench.

24 **THE COURT:** Good. Yeah. That's good. Because I had
25 a huge question mark by that one.

1 **MR. WINSTON:** Fair enough.

2 **THE COURT:** Thank you.

3 **MR. WINSTON:** Thank you, your Honor.

4 **THE COURT:** All right. Do you know what's in now?

5 Well, that takes care of the evidentiary objections,
6 and the exhibits are now complete. Does anybody have any other
7 exhibits they wish to offer?

8 All right. I'm sorry.

9 **MS. STEINGART:** The only question I have, your Honor,
10 is shall we mark the revised bidding procedures because we --

11 **THE COURT:** I'll deal with that in a minute.

12 **MS. STEINGART:** Okay.

13 **THE COURT:** Because they were actually filed --

14 **MS. STEINGART:** That was -- right. Okay.

15 **THE COURT:** -- and I can take judicial notice of them
16 as a filed document.

17 **MS. STEINGART:** Okay.

18 **THE COURT:** So, I did not intend to mark them.

19 **MS. STEINGART:** Okay. Thank you, your Honor.

20 **THE COURT:** I know I have the issue with the Caruso
21 declaration. I'll deal with that in a moment.

22 What I am going to do now though is make a record of
23 the pleadings that I have reviewed to ensure to the extent
24 possible that I've read everything.

25 I've already indicated that I did read and I

1 conducted independent research because nobody responded to the
2 objection filed by the purported Informal Committee of Station
3 Employees to the plan of reorganization. That was Document
4 1240. I have read it. I've already gone through it.

5 I have reviewed Docket Number 1130 which is the
6 notice of the filing of the disclosure statement to accompany
7 the joint plan of reorganization.

8 I have reviewed the notice of the filing of the joint
9 Chapter 11 plan of reorganization for Station Casinos, Inc.
10 Those were both filed on March 24th, and I know that they're
11 going to be revised, but I went back. I reviewed them before
12 May 4th, and I went through them again for the purpose of
13 today's hearing.

14 I have reviewed, as I noted, Docket Numbers 1407 and
15 1408, which are the transcripts of the hearing that occurred
16 May 4th and May 5th.

17 I have reviewed Docket Number 1418 which was an order
18 extending -- first compromise agreement extending deadline by
19 which debtor Station Casinos must assume or reject the lease.

20 And I have reviewed Docket Number 1440, my order
21 entered on May 13th extending exclusivity.

22 I have reviewed the orders -- the order approving the
23 original compromise of the master lease.

24 I have taken -- of course reviewed, as I noted, the
25 transcript of the previous hearing. Certain witnesses were

1 subject to cross examination at that hearing. I have taken
2 another look just to make sure that I have all the
3 declarations.

4 Docket Number 1180, the declaration of Richard
5 Haskins (phonetic) filed on April 7th.

6 Docket Number 1325, declaration of Richard Haskins
7 filed on April 28th.

8 I have reviewed his deposition that's previously been
9 identified as Number 6.

10 I have reviewed Docket Number 1181 which is the
11 declaration of Mr. Kors (phonetic) dated April 7th, and his
12 deposition taken April 30, which was marked for identification
13 as Exhibit 9.

14 I have read the declaration of Thomas Friel
15 (phonetic), Docket Number 1173, filed on April 7th. The
16 declaration of Thomas Friel filed as Docket Number 1176 on
17 April 7th. The deposition of Mr. Friel taken April 27th, and
18 marked as Exhibit 8.

19 I have read the declaration of Daniel Aronson
20 (phonetic), Docket Number 1177, filed on April 7th. He's with
21 Lazard Freres and Company. He's the financial advisor to the
22 debtors. I've read, as I've said, his declaration. Then he
23 filed a supplemental declaration on April 28th, Docket Number
24 1326, that I've read, and of course his deposition that was
25 taken April 29th, and that has been marked for identification

1 as Exhibit 6.

2 I have read the declaration of Jason Friedman
3 (phonetic), Docket Number 1318, and it contains the ground
4 lease regarding the Texas Station, so I've read...

5 Those were all before me at the hearing the first
6 week of this month, but I took another look at them again.

7 I have reviewed the debtor's designation, deposition
8 transcripts to be offered into evidence, Docket Number 1524,
9 filed on May 25th. And these are the depositions of
10 Mr. Aronson, Mr. Caruso, Mr. Flax (phonetic), Mr. Friel,
11 Mr. Genereau, Mr. Haskins, Mr. Kors, Mr. Kreeger, and
12 Dr. Nave. I've read them all.

13 I have read the designations that were filed on
14 behalf of the committee. Those can be found, I think I found
15 them all, 9A. And the reason that there's a 9A is that 9 was
16 Mr. Kors' deposition. There were subsequent designations. As
17 I indicated, I've read them. I annotated them.

18 The other designations I believe are all found near
19 the end of the exhibit books. Number 76 -- excuse me.

20 Number 76A, the designation of Mr. Caruso. I've read
21 that, and I've read all the designations.

22 Seventy-eight A, designations of Michael Genereau.
23 I've read that as well.

24 Seventy-nine A, designations of Scott Kreeger.
25 Eighty, designation of Dr. Nave. I've read all of those.

1 And I've read -- the depositions are Number 76 for
2 Mr. Caruso, 77 for Mr. Flax, 78 for Mr. Genereau. Am I
3 pronouncing that correctly?

4 Seventy-nine for Mr. Kreeger, and 80 for Mr. Nave.

5 I think that's all the depositions.

6 I would -- we've got a problem. We have a problem.
7 The Genereau -- let me talk about that right now.

8 With each one, you can't see it, but with each one of
9 the depositions, I have kind of done my own little depo of some
10 of these in addition to what you folks have done. And I noted
11 that Genereau, starting at about Page 106 and going on for
12 about four pages, it was for attorneys' eyes only. The exhibit
13 book indicates that the deposition has already been provided to
14 me by debtor, and in fact, it has. But the transcript I
15 received was the entire transcript.

16 The -- there was a declaration of Mr. Ledley
17 (phonetic), I believe, that contains those -- that exclude
18 those pages. The confidential portion is actually attached as
19 an exhibit to Ms. Axelrod's declaration.

20 So, I -- and I know that there's -- and this is kind
21 of important because it's cited in footnote 10, I believe, of
22 the debtor's objection, together with a reference to an exhibit
23 that the deponent had at that time, which was Exhibit 14 at the
24 deposition.

25 And Ms. Steingart tied them both together at that

1 time, and I think appropriately. I don't have -- that's not
2 the issue. The issue is what should be included in this
3 record.

4 Because if you want to seal those four pages, that
5 can be done as opposed to the -- but you've already referred to
6 it. So I'm interested in how you folks are -- and you both
7 noted -- the lawyers at the time of the deposition both noted
8 that they really didn't go into any specifics. And I'm -- that
9 has to deal with Penn Gaming. This is what we're talking
10 about.

11 You know, the question is--

12 **MR. PERRY:** Your Honor, I think the --

13 **THE COURT:** -- were there any further debtors or
14 potential buyers? That type of thing.

15 **MR. PERRY:** It --

16 **MS. STEINGART:** Right. You know, it was on that
17 topic and it was also, your Honor, the exhibit that was under
18 seal and is now before you as Exhibit 34, your Honor.

19 **THE COURT:** Is it 34?

20 **MS. STEINGART:** Yes, it is, your Honor.

21 **THE COURT:** Is it admitted?

22 **MS. STEINGART:** It is admitted. There was no
23 objection -- there was --

24 **THE COURT:** Then why -- then why do we need to -- is
25 that -- I don't see that.

1 MS. STEINGART: Okay.

2 THE COURT: Hold it. What --

3 MR. UNIDENTIFIED: It's been filed under seal.

4 THE COURT: It is a blue --

5 MS. STEINGART: Yes.

6 THE COURT: So it is under seal.

7 MS. STEINGART: Yes. Yes, your Honor.

8 THE COURT: That's what that -- Blackstone 11061,
9 that's exactly what it is.

10 MS. STEINGART: Yes, your Honor. So, it was a
11 combination of the transcript and that exhibit that talks about
12 the interested party, and also about the amounts involved in
13 the expression of interest. And that's --

14 THE COURT: Right. Exactly. And I know how
15 Mr. Genereau described it, so I -- okay.

16 MS. STEINGART: Right. And that's really all we want
17 to refer to generically. We didn't want to give a precise
18 number. We didn't -- we weren't interested, but that will be a
19 component of what we present here today, but in a very -- but
20 in a high level way --

21 THE COURT: Then I need an order sealing that portion
22 of the transcript and this exhibit.

23 MS. STEINGART: Okay.

24 THE COURT: I've signed a number of orders sealing,
25 and I don't -- the fact that I have blue that would indicate

1 sealing, that may have already been taken care of for 34, but
2 I'm not sure.

3 **MS. STEINGART:** Right. There are several of the
4 exhibits --

5 **THE COURT:** Yeah.

6 **MS. STEINGART:** -- that we provided to you, and we
7 had discussions with each issue.

8 **THE COURT:** But I need to make sure those pages are
9 separate.

10 **MS. STEINGART:** Right.

11 **THE COURT:** I'm not going to -- I'm not going to --
12 then what I need is a redacted. I think what we'll do, I think
13 it's Mr. Ledley's -- am I pronouncing that correctly also?

14 **MR. QUSBA:** Mr. Ledley (pronouncing).

15 **THE COURT:** Mr. Ledley. He's got the non-
16 confidential portions as Exhibit A, I believe, to his
17 declaration. It's around here somewhere. I'll get to it.
18 That's what should be -- that is what should be included in the
19 exhibit book as the deposition of the witness.

20 And then the blue pages are already in Mister --
21 excuse me, in Ms. Axelrod's declaration, so they're already
22 there.

23 **MR. PERRY:** And if -- then the issue is that portion
24 of Ms. Axelrod's declaration has not been sealed then we need
25 to provide you with it.

1 **THE COURT:** Oh, it has been.

2 **MS. STEINGART:** It has been.

3 **THE COURT:** It's actually in blue paper. So --

4 **MS. STEINGART:** Your Honor, we have it here.

5 **MR. PERRY:** Oh, so -- so the whole deposition
6 transcript --

7 **MS. STEINGART:** Yes.

8 **MR. PERRY:** -- is before the Court. It's just in two
9 separate places.

10 **THE COURT:** No, the whole deposition transcript was
11 provided to me, and it's indicated in the deposition book that
12 that's what belongs in there. It is not.

13 What belongs in there is a combination of two things.
14 Exhibit A to Mr. Ledley's declaration, and I believe it's also
15 Exhibit A to Ms. Axelrod's. That is a combination of the non-
16 confidential and the confidential portions. That's what I'm
17 saying.

18 **MR. PERRY:** We'll clean that up, your Honor.

19 **THE COURT:** Okay. I just want to make sure that, in
20 case somebody reviews this that they're reviewing what I
21 actually looked at.

22 **MR. PERRY:** Okay.

23 **THE COURT:** Without violating the confidentiality
24 postscriptsions.

25 We'll continue. I have read Mr. Genereau's May 12th

1 deposition, and of course went back and reviewed his
2 declaration. And I tried to find all of the relevant exhibits
3 in the exhibit book, and I'm sure they'll be pointed out to me
4 if I missed any as we go along today.

5 That declaration by the way of Mr. Genereau is Docket
6 Number 1319.

7 I went back and reviewed the declaration of --
8 verified statement of Robert Flax, Docket Number 1247, and also
9 the sealed declaration, and his deposition taken on April 29th.

10 Now, Mister, as I noted, Mr. Flax's declaration was
11 not marked. I should say that. Mr. Flax's deposition was not
12 marked in May -- May 4th or 5th, but it has been marked and is
13 now part of the record on this case for today. So that's good.

14 I have reviewed the declaration of Scott Kreeger,
15 Docket Number 11 -- 1324, filed on April 28th, and his
16 deposition taken on May 14th. And it has been marked for
17 identification as well.

18 I have read the deposition of Dr. Nave taken on May
19 3rd.

20 I have of course reviewed the designation by the
21 committee.

22 I reviewed a designation, counter designation that
23 was filed by counsel for Mr. Nave.

24 And I reviewed supplemental designations to the
25 designations provided by the Unsecured Creditors Committee,

1 Docket Number 1527.

2 And Dr. Nave's deposition has also been marked for
3 identification.

4 I'm not aware of any declaration that has been
5 offered to me from Dr. Nave. Is that correct?

6 **MR. KRELLER:** That's correct, your Honor.

7 **THE COURT:** All right. Good.

8 I have reviewed Docket Number 1320 which is the
9 declaration of Robert Caruso filed on April 28th. And there
10 was a motion to seal.

11 I've reviewed Docket Number 1332 which is the order.
12 And I've reviewed the unredacted copy of it.

13 I have reviewed the joint evidentiary objection filed
14 by the committee and the independent lenders to that
15 declaration. Docket Number 1474 filed on May 18th.

16 I read the appendix in support of the joint
17 evidentiary objection filed as Docket Number 1475, and it
18 consists of excerpts from transcript of his deposition recited
19 in the evidentiary objection.

20 And then there were a couple -- the other exhibits is
21 the CV from Mr. McDonough, declaration of Mr. McDonough, and
22 then some testimony where Mr. McDonough testified and the
23 reaction to his testimony, all of which I find not to be of any
24 significant interest to me.

25 Then there is Docket Number 1500 which is errata to

1 the index adding an additional citation. I've read all of
2 those.

3 And I, once again, have a copy of his deposition
4 here. I will deal with the -- I will hear argument on the
5 objection in minutes.

6 They only -- there was a response filed in one of the
7 oppositions I know. That's why I want to make reference to
8 that before I hear arguments. But this will be the next matter
9 that I consider because I think it's the last evidentiary issue
10 that's before me.

11 There were a number of pleadings that were filed
12 prior to the hearing I conducted May 4th and 5th. I have
13 reviewed the following: Docket Number 1522 which is the notice
14 of the submission of the red lined further revised second
15 amended master lease compromise agreement. That was filed on
16 the 24th of May.

17 I read Docket Number 1521 which is the notice of
18 submission of the further revised -- but that's -- I didn't
19 spend any time with that. I spent all the time with the red
20 lined.

21 I have reviewed the joint motion of Station Casinos,
22 Inc., also known as OPCO, and FCP PROPCO, Inc., also known as
23 OPCO, for an order approving the second amendment to amended
24 and restated master lease compromise agreement that was filed
25 on the 7th of April, Docket Number 1179. So, I read those.

1 Earlier there had been filed a notice of submission
2 of revised second amended master lease compromise agreement
3 that was filed on April 19th. There was the opposition that
4 was filed by the, whatever it's called, the independent
5 lenders, Docket Number 1243. It was part of the omnibus
6 response to all of the motions that were pending before me on
7 the 4th and 5th of May.

8 The objection by the committee, Docket Number 1246.

9 Declaration of Bonnie Steingart, Docket Number 1248.

10 The reply of PROPCO, Docket Number 1314.

11 The joinder, the Bank of Scotland, Docket Number

12 -- and the administrative agent's consolidated response.

13 That's Docket Number 1321.

14 The debtor's reply, Docket Number 1323.

15 In that regard, I mean, that just gave me a
16 background, and I was really of course more concerned with the
17 red lined and what's before me today.

18 As I noted, I did go back and review Docket Number
19 961, the findings of fact, conclusions of law in support of the
20 order approving the master lease compromise agreement that was
21 entered on February 2, as well as my order approving the master
22 lease compromise agreement, Docket Number 962, entered on
23 February 2nd. Those are as a result of hearings that were
24 conducted on December 11th, 2009.

25 Those are the pleadings I've read in regard to red

1 lined -- to the second amended compromise of the master lease.

2 I have also gone back to review the debtor's motion
3 for an order authorizing the OPCO debtors to enter into a
4 restructuring support agreement with the OPCO lenders, Docket
5 Number 1219, filed on April 19th. The lenders opposition,
6 Docket Number 1361. The objection by the committee, Docket
7 Number 1362.

8 I don't think there have been any pleadings filed
9 regarding this matter other than the objections that I will
10 refer to, but I didn't see anything that directly related to
11 the OPCO support agreement or the OPCO restructuring support
12 agreement that's been referred to. Is that correct?

13 **MS. STEINGART:** Other than the objections, your
14 Honor, correct.

15 **THE COURT:** I didn't miss any -- okay. Thank you.

16 I have reviewed as Docket Number 1525 that was filed
17 Wednesday, the 25th of May, notice of submission of further
18 revised bidding procedures in connection with the debtor's
19 motion regarding the -- I've read it. I've annotated it.
20 Hopefully familiar with it.

21 I also went back and took a look at the motion that
22 was filed on April 7th, Docket Number 1175, the exhibits
23 thereto. The notice of revised bidding procedures filed as
24 Docket Number 1214 on the 19th. That was the whole issue what
25 happened on the 19th of April.

1 I read the Docket Number 1216 which is a notice of
2 submission of the red lined comparison of the second amended
3 and restated master lease compromise agreement.

4 I read Docket 1243, the Independent Lenders omnibus
5 objection. Docket 1245, the objection by the committee.
6 Twelve forty-nine, the declaration of Ms. Steingart and
7 exhibits attached thereto.

8 There's -- and this is -- I read the consolidated
9 response of the prepetition lenders, those would be the OPCO
10 lenders, filed on behalf of the administration --
11 administrative agent. That's Docket Number 1317 filed on the
12 28th. That's where the joinder by Bank of Scotland -- I also
13 think Wells Fargo joined in.

14 I read the omnibus reply of the CMBS Lenders, also I
15 think referred to as -- excuse me, as mortgage lenders.

16 Docket Number 1315, debtor's reply. The opposition
17 Docket Number 1322. Supplemental objection filed on May 3rd
18 by the committee, Docket Number 1364. Declaration of
19 Ms. Steingart in support thereof, and that had to do with those
20 -- with the declarations that were filed. Request for judicial
21 notice, Docket Number 1366, which I believe I granted.

22 And -- yes. There's the joinder Wells Fargo in the
23 administrative agent's consolidated response, Docket Number
24 1388.

25 So, all members of the steering committee, Bank of

1 Scotland and Wells Fargo, have joined in the position of the
2 administrative agent. They represent, between the two of them,
3 Bank of Scotland and Wells Fargo, about 23 percent of the
4 outstanding liability. Is that correct?

5 **MR. UNIDENTIFIED:** I'm doing the math, your Honor. I
6 think so.

7 **THE COURT:** Yeah. I think that's what's indicated.

8 **MR. QUSBA:** Yes. I think that's correct.

9 **THE COURT:** Okay. I read the notice of submission of
10 asset purchase agreement, Docket Number 1526. And I don't mean
11 to make light of anything, but if you ever want to cure
12 insomnia, this is the answer.

13 I have a couple of questions that I need to have
14 answered before I go forward regarding this document. It was
15 filed about 4:10 p.m. on Wednesday afternoon.

16 A lot of -- all the other parties have numerous
17 counsel. The committee's got numerous lawyers and advisors,
18 together with the independent lenders. They have two lawyers,
19 two firms representing them. So, if I don't understand
20 everything, there's only one lawyer reading this. Me. And I'm
21 not sure I understand some of this.

22 I went through the agreement and tried to find the
23 most relevant portions. I was concerned regarding what was
24 being bought and what wasn't being sold. So I looked with
25 particular concern regarding definitions, and, for example,

1 included properties. What was being sold there. I understood
2 that.

3 Alternate bid. Alternate bid expiration date. I
4 read that. And of course when I read the red lined versions of
5 bidding that has been proposed, I understood how those fit
6 together.

7 I was concerned, I think its Paragraph 2.4. "The
8 purchase assets are defined as the assets listed under A1, B1,
9 C1, modified percent of 2.6." Well, that just means you have
10 to turn to those.

11 Paragraph 2.4 deals with excluded assets, so I turn
12 to that provision. I think it's at Page 22.

13 "Nothing contained in this agreement shall be deemed
14 to sell, transfer, assign, or convey the assets and
15 property of the sellers set forth in Schedule 2.4,
16 hereto the excluded assets, and seller shall retain
17 all right, title, and interest to and under the
18 excluded assets."

19 This is really at the heart of the dispute regarding
20 the OPCO sale, as I understand it. Your -- it's the -- the
21 committee and the independent lender. I think the word, their
22 qualms were regarding the inability of bidders to buy the
23 excluded assets. Is that correct?

24 **MS. STEINGART:** Yes, your Honor, but I think that the
25 definition here, the excluded assets, is not that same

1 definition.

2 **THE COURT:** Well, that's where it gets a little --
3 that's why we're going to go through this.

4 **MS. STEINGART:** Yeah.

5 **THE COURT:** Because it gets a little bit confusing.
6 Because I did some cross checking thought. I turned to
7 Schedule 2.4, and was not of great assistance.

8 So I said, oh, let's see if we can find this
9 somewhere else. A1 is exhibit of purchased assets. I
10 understand that.

11 A2, assumed liabilities.

12 B1. This is -- B1. Exhibit B purchased assets.

13 "All of the right, title, and interest of sellers and
14 the assets and properties of sellers set forth on
15 this Exhibit B1 as of the -- except for assets and
16 properties defined as excluded assets."

17 That's the same definition, because if you go through
18 Items 1 through 26, they're the same that I found as the
19 excluded assets that were not to be conveyed to a party other
20 than the stalking horse bidder. Is that accurate?

21 **MR. KRELLER:** Your Honor, within the bucket of
22 excluded assets, things the third party bidders would not have
23 the right to acquire.

24 There's two subsets. One is those assets that are
25 being transferred to new PROPCO. Either it's the stalking

1 horse bidder if it prevails or separately --

2 **THE COURT:** For 35 plus 13.

3 **MR. KRELLER:** -- separate and apart from a third --

4 **THE COURT:** That's my point. I understand that.

5 **MR. KRELLER:** But 35 plus 13 plus other things we'll
6 talk about.

7 There is a -- the second subset of excluded assets
8 are things that are not being sold to anyone at this point.
9 Not to the third party buyer --

10 **THE COURT:** That's good.

11 **MR. KRELLER:** -- not to the stalking horse bidder in
12 PROPCO.

13 **THE COURT:** But what is B1? B1 appears to be those
14 that aren't going to be sold to a third party. Two four does
15 not identify them. Two four is what's being excluded from
16 anyone. That's what I understand. Am I correct or am I
17 incorrect?

18 I just want to make sure that if anybody bids on
19 this, they understand the asset purchase agreement that they're
20 bidding against.

21 **MR. KRELLER:** Your Honor --

22 **THE COURT:** I think that's a point you were trying to
23 make, Ms. Steingart, is 2.4 is every -- no one buys those. B1
24 is, only third parties aren't allowed to buy those.

25 **MS. STEINGART:** Exactly right, your Honor.

1 **MR. KRELLER:** That's correct, your Honor. B -- 2.4
2 is the full category of excluded assets. Item 1, they're all
3 PROPCO assets, or the items where PROPCO has -- PROPCO or the
4 PROPCO lenders have liens. They're not purchasing those
5 assets. A third party is not purchasing those assets. Those
6 are going over to PROPCO in satisfaction of their security
7 interest and liens.

8 **THE COURT:** Does 2.4 then subsume what's on B1? It
9 would have to. Because 2.4 --

10 **MR. KRELLER:** B1 is just those that are the subject
11 of the purchase.

12 **THE COURT:** Right.

13 **MR. KRELLER:** Of the purchase by a new -- if you --
14 we'll get through this in the bid --

15 **THE COURT:** By a non-stalking horse purchaser.

16 **MR. KRELLER:** -- in the bid procedures by a non-
17 stalking horse -- by new PROPCO as non-stalking horse.

18 **THE COURT:** All right.

19 **MR. KRELLER:** I call those new PROPCO purchased
20 assets, and that's how we --

21 **THE COURT:** Now I understand.

22 **MR. KRELLER:** -- define them in the bid procedure.

23 **THE COURT:** I understand the distinction now. I just
24 wanted to make sure that I did, because I went back and checked
25 and I saw that they were the same, and I wanted to make sure I

1 understood. And more importantly, that anybody who is bidding
2 understands that their bid does not include those items listed
3 on B1.

4 **MR. KRELLER:** That's correct, your Honor.

5 **THE COURT:** That's the critical issue.

6 **MR. KRELLER:** And, your Honor, we -- the revisions
7 that you've seen in the bid procedures on these points are
8 actually an attempt by me to marry up the bid procedures to
9 what my corporate counterparts have done in a more verbose way
10 here.

11 **THE COURT:** Okay. All right. I understand. Anyway,
12 I've reviewed the document. That helps me understand. So
13 those are all what I would call the pleadings that are actually
14 -- the original motions and the objections, replies, and
15 subsequent document filings.

16 I am now going to refer to the post May 5th briefing
17 that I allowed, which I thought was limited to an analysis, and
18 are even arising from the depositions that I permitted because
19 of the late filed declarations. Candidly, some of the
20 arguments go beyond that, and I've already read it, so it
21 really doesn't matter.

22 The first is the second supplemental objection filed
23 by the committee regarding the revised second amended and
24 restated lease compromise agreement, bidding procedures, and
25 OPCO plan support agreement. So that's Docket Number 1481.

1 I will tell you that there -- 1481 was filed under
2 seal. I have read the pleadings that were filed under seal, so
3 I've read the entire pleading. I have the copies of the
4 redacted portions just -- we just checked them to make sure
5 that they were consistent. And I pulled the case law that's
6 been cited, and I've read the cases.

7 I've read Docket Number 1482, which was the
8 independent lenders supplemental brief regarding new witnesses.
9 And it was limited to an examination of the new witnesses even
10 though new was in quotes, as I guess independent lenders could
11 be in quotes.

12 I have a question at -- would you turn to Page 13,
13 please, Mr. Goldberg? And the reason I'm doing this is I'm
14 going to hear argument and not evidence later, and I want to
15 make sure I understand the evidence.

16 You referred to Mr. Kreeger's declaration, 1324,
17 Paragraph 8, as stating that "In the event of a separation,
18 OPCO would have to spend 20 million to acquire brand new
19 hardware to build a primary and secondary backup system.'

20 I don't think that's right. I think he said PROPCO
21 would. And I think that he said, because then at your point,
22 at your deposition, as you note in the next sentence, "At his
23 deposition, Mr. Kreeger acknowledged that \$20 million he used
24 in his declaration is woefully inadequate."

25 He didn't say "woefully." "Because it would not put

1 PROPCO in the same position that it would enjoy if it received
2 the IT systems from OPCO," and then you quote.

3 So that has to be --

4 **MR. UNIDENTIFIED:** OPCO should be PROPCO. That's
5 correct, your Honor.

6 **THE COURT:** And it's not in that paragraph. I have
7 his declaration.

8 His declaration, Paragraph 8, does not refer to
9 anything that PROPCO would have to spend to replicate the
10 system. I think, and I could be wrong, that it's Paragraph 14.
11 And I'm asking you to clarify that for me, please.

12 **MR. WINSTON:** Your Honor, that's correct. That
13 reference should be to Paragraph 14.

14 **THE COURT:** And it reads, "Option 4 is impractical."
15 That's the rip and tear, replace option. "It leaves PROPCO
16 with no IT so that PROPCO would have to spend 20 million to
17 acquire brand new hardware and develop primary and secondary
18 backup computer systems. Under any of the Options 1, 2, or 3,
19 the overall cost is substantially less, and OPCO ends with
20 either a new system or one that a third party purchaser already
21 relies on. Under any of the options contemplated by the
22 separation agreement, OPCO is better off..."

23 His reference to a separation agreement is to the
24 compromise. All right.

25 So now we're -- I've read the right one.

1 **MR. UNIDENTIFIED:** Yes, your Honor.

2 **THE COURT:** Okay. Thank you. I read the declaration
3 of Brett Axelrod, Docket Number 1490, and all the exhibits
4 attached thereto.

5 I read Docket Number 1505, and it came in two forms.
6 The confidential form which I read. That's the response of the
7 administrative agent. Deutsche Bank Trust Company Americas.
8 That's from the prepetition OPCO lenders.

9 Filed -- there's a separate notebook that I received
10 which was a copy of Docket Number 1505, together with the
11 declaration of Michael Ledley, and I -- which contain a number
12 of exhibits which I have read and annotated. So, I've read
13 both.

14 I read the debtor's reply to supplemental objections,
15 Docket Number 1509. That was filed on May 21st, and I pulled
16 the case and read the cases. At least what I thought were the
17 critical cases.

18 I read Docket Number 1510, the supplemental reply of
19 FCP PROPCO. This was the debtor, PROPCO the debtor, filed on
20 May 21st, and taken a look at some of the cases cited therein.

21 I didn't refer, but I -- well, I think I did. I do
22 have the cases also by the committee.

23 I think that that completes my rendition of pleadings
24 I read. Have I missed any pleadings that were filed by any
25 party regarding the matters that were pending before me on May

1 4th, 5th, or today?

2 **MS. STEINGART:** No, your Honor.

3 **THE COURT:** No. Mr. Goldberg?

4 **MR. GOLDBERG:** No.

5 **MR. KRELLER:** Nothing from the debtors, your Honor.

6 **THE COURT:** All right. Good. I'm going to take a
7 short break and then I'm going to take up the objection to --
8 no, let's just get the Caruso objection out of the way.

9 I didn't bring out my entire research file on Daubert
10 including an article that I wrote on Daubert. I am familiar
11 with it, so we don't have to spend a lot of time.

12 I will say this. The Daubert is not relevant. He's
13 not being offered as an expert.

14 Let me pull your objection. The opposition, I think
15 it's in the reply that was filed --

16 **MR. WINSTON:** It's the OPCO agent's reply, your
17 Honor.

18 **THE COURT:** I think that's where it's at.

19 **MR. WINSTON:** Where it says "Their witness."

20 **THE COURT:** Yeah. One moment. I had a sheath with
21 my notes. These are just my notes.

22 Yes. Let me pull that pleading, please.

23 **(Pause)**

24 Oh, it's on Page 14.

25 **(Pause)**

1 One moment. Oh, here. Okay. As I understand it,
2 this objection is limited, tell me if I'm wrong, to Paragraphs
3 5 and 6 of the declaration. Is that correct?

4 **MR. WINSTON:** Five and six, and the report itself.

5 **THE COURT:** It says five and six of the declaration.
6 Look at Page 2, Line 4.

7 **MR. WINSTON:** Yeah, and if you could look at Line 8,
8 and the report.

9 **THE COURT:** Right. Page 5 simply says what he did.
10 Paragraph 5 simply says what he did.

11 **MR. WINSTON:** Yeah, if your Honor is concluding it's
12 not being offered for expert testimony, then I think Paragraph
13 5 goes -- it's not --

14 **THE COURT:** So do I.

15 **MR. WINSTON:** Yeah.

16 **THE COURT:** I feel the same way about six. He
17 explains that indicative values, another analysis he provided,
18 all in his detailed report, gave the steering committee a sound
19 basis. That's his opinion. I don't know how much weight I'll
20 -- I mean, I understand its opinion and not a fact. But I'll
21 be glad to hear your argument at this time.

22 **MR. WINSTON:** Okay. Thank you, your Honor. I've
23 heard what your Honor says. I completely agree he's not
24 qualified as an expert. They're saying they're not offering
25 him as an expert. So we can move on to that.

1 The question is, what is it, and what is it being
2 offered for. If it was being offered solely for the purpose to
3 demonstrate why the OPCO lenders agreed -- what they agreed to,
4 then it's irrelevant because this is the debtors' motion to
5 sell these assets.

6 And if the debtors have no evidence as to why they
7 think this is a good compromise from a valuation perspective,
8 the fact that Mr. Caruso told the OPCO lenders what he thought
9 doesn't matter.

10 I don't think that's why they're actually offering
11 it. I think they are trying to establish a valuation basis for
12 the debtors to enter into what they entered into.

13 And the reason why I say that is when they filed the
14 motion on April 7th, and then they did their supplement on
15 April 19th, our objections and the objections of Mr. Goldberg's
16 clients said the same thing, which was where is the evidence of
17 value. There is none. And it showed up on April 28th in the
18 form of the OPCO lenders seeking to put into evidence not only
19 what Mr. Caruso told his clients, but the report itself.

20 And the reason why that's important is that we've
21 heard the testimony both in the depositions and then when I
22 cross examined Mr. Aronson on May 5th, or May 4th, I forget,
23 that he was told by A and M what the indicative values were,
24 and he reported it to the board on April 16th, and the board
25 took that as a basis for entering into the transactions it

1 entered into.

2 **THE COURT:** I think that's, if I remember correctly,
3 I read Dr. Nave's deposition and that seems to be what
4 occurred.

5 **MR. WINSTON:** Okay. So, if it's being offered for
6 the purpose of establishing why the debtors entered into what
7 they entered into, then this is improper lay opinion because
8 it's based upon Mr. Caruso not having the knowledge himself of
9 what is in the report. Because that's -- we demonstrated that
10 on a number of occasions. And then the report itself is based
11 upon lots of hearsay statements.

12 And then, we can go into this. There's a lot of
13 methodology flaws in the report. If the purpose is again for
14 the OPCO lenders to say that this is why we've agreed to having
15 the Fertitta gaming entity be the stalking horse bidder, okay.
16 It's irrelevant then for what the debtors need to establish for
17 purposes of their master lease compromise motion. And for
18 their bidding procedures motion. And for the OPCO -- other
19 than for potentially the OPCO restructuring support agreement
20 motion, but only for purposes of establishing why the OPCO
21 lenders entered into it.

22 So, from that perspective, if your Honor is going to
23 allow it in for the purposes which I think we're now hearing as
24 why they want to enter it into, you have no record of what the
25 value of any of the excluded assets are.

1 If you are taking it for the purposes of establishing
2 what is the value of some of the excluded assets, the three
3 categories that Alvarez did in fact provide indicative values,
4 it's improper lay opinion.

5 Thank you, your Honor.

6 **MS. QUSBA:** Good morning, your Honor. Sandy Qusba
7 with Simpson, Thacher and Bartlett, counsel for Deutsche Bank
8 Trust Company Americas as the OPCO agent.

9 I'm not sure how many times we can say this, but the
10 report as well as the declaration are not opinion testimony.
11 They're not being offered as opinion testimony, expert or
12 otherwise. This is fact testimony.

13 And I'm shocked to hear that there's a relevance
14 objection with respect to the report. I certainly hope
15 Mr. Winston, the committee, and the splinter banks recognize
16 that one of the principle factors that presumably the Court
17 will consider with respect to the plan facilitation motions is
18 with respect to whether they are in fact in the paramount
19 interest of creditors.

20 And, your Honor, this report, what Mr. Caruso did and
21 Mr. Genereau did, directly relate to that, whether it's in the
22 paramount interest of creditors. Because we, as creditors,
23 60 percent of the OPCO bank debt, \$530 million, made an
24 informed decision. And what was that informed decision based
25 upon? It was based upon work. We did the work. We hired the

1 advisors. They spent the money. They educated us as a
2 steering committee. And that's what we made our decisions
3 based upon.

4 **THE COURT:** What about the distinction between your
5 client as lender and OPCO as debtor?

6 **MR. QUSBA:** Your Honor, I cannot speak to what work
7 OPCO did or did not do as a debtor. This is being offered to
8 demonstrate to you what work we did. Why we got comfortable.
9 Why we think all these transactions make sense to us.

10 And it's not being offered for the valuation of it.
11 We provided -- Alvarez and Marsal provided a range of
12 valuation. And we have never --

13 **THE COURT:** Thirty-four to 63.

14 **MR. QUSBA:** That sounds correct, your Honor. But
15 we've never -- we've never suggested that the excluded assets
16 equals X, because quite honestly it's much more than X. Okay?
17 It's dollars. It's assumed liabilities. But more importantly,
18 it's also the backbone, the foundation of a stalking horse bid.
19 It's the foundation of transition should a split occur.

20 There are many other valuable considerations that we
21 took into account when we agreed to the excluded asset concept,
22 the 35 number, the 13 of assumed liabilities, the Texas Station
23 solution. It is a package deal for us, your Honor.

24 But with respect to putting some range of numbers
25 with respect to the assets that are being excluded, we did the

1 homework. We did it.

2 **THE COURT:** Rebuttal? I'm sorry. Go ahead.

3 **MR. PERRY:** Your Honor, very briefly, on behalf of
4 the debtors, we have introduced evidence of what we, the
5 debtors, did. It's in the form of Mr. Haskins' testimony,
6 Mr. Kreeger's testimony, Mr. Friel's testimony.

7 We did, in fact, as Mister -- Dr. Nave's testimony
8 reflects, and Mr. Aronson's testimony reflects, consider the
9 work that the OPCO banks did. It's not irrelevant because we
10 considered it. They can certainly attack us for considering
11 it, but that really goes to the weight of the evidence.

12 But from our perspective, we did our own analysis.
13 We also checked that with the A and M analysis.

14 **THE COURT:** Thank you.

15 **MR. WINSTON:** Your Honor, thank you. Just very
16 briefly.

17 First, the notion that the report is somehow a
18 statement of fact as opposed to opinion is -- that's just
19 wrong. I mean, one has to only flip through the 40 some odd
20 pages of it to see that they're opining as to value. There's a
21 value range. Fair enough.

22 It's still opinion. It's lay opinion is what they're
23 trying to say it is. It's just not admissible because it's
24 either based upon hearsay. It's not based upon Mr. Caruso's
25 perception. We demonstrated that. It's not admissible.

1 Again, if they're offering it for the purposes of why
2 they entered into the transaction, I would argue its irrelevant
3 because it's not their transaction. They're not the ones that
4 are allowed to sell these assets.

5 With respect to the debtors, if the decision is that
6 they entered into a transaction based upon what they heard from
7 Alvarez, yes, we can certainly tap what Alvarez did, but that
8 doesn't make this report admissible.

9 Thank you, your Honor.

10 **(Pause)**

11 **THE COURT:** The Caruso declaration and the Alvarez
12 report that's attached to it was considered by the parties in
13 arriving at the bidding procedures and the compromise, and, it
14 strikes me, the OPCO restructuring support agreement.

15 And they are the debtor, OPCO debtor, and OPCO
16 lenders are parties to that restructuring agreement, so it's
17 relevant for that. That -- the basis of the objections are
18 that there was no or inadequate weight given to the value of
19 the excluded assets. By here, I mean, excluded assets that
20 would not be available to a bidder at an auction that I'm being
21 requested to conduct pursuant to the bidding motion.

22 I think that what the steering committee lenders and
23 the OPCO debtors considered is relevant. I think that the
24 weight given to it by those parties is subject to argument and
25 impeachment, which has been well pleaded and argued already in

1 the pleadings that I have received. And I understand them.

2 But I will not consider either the Caruso declaration
3 nor the report attached thereto as an expert, but I think that
4 when one looks at a number of cases in the Circuit, starting
5 with *Woods and A and C Properties* (phonetic), that in
6 determining whether or not to approve a settlement, one needs
7 to be able to gauge a range of reasonableness and make a
8 determination that the settlement falls somewhere within that
9 range.

10 It is not to conduct a mini trial. I can make the
11 determination whether or not a range exists and whether or not
12 the settlement falls within that range. And I believe that
13 this evidence is relevant for that purpose. Not necessarily to
14 establish the value of any particular asset, because frankly,
15 when I read the responses, I didn't understand some of the
16 objections. I didn't understand some of the positions that had
17 been taken on the other side either.

18 Because basically what it boils down to is this value
19 might have -- or this asset may have value for -- to PROPCO,
20 but it would not have any value for a potential third party
21 bidder, and hence probably wouldn't have any value for OPCO
22 except that OPCO might be able to use it as leverage against
23 PROPCO. So, what you're really attacking is the negotiations
24 that led to this agreement. This is evidence of that.

25 Perhaps it's wrong, but I looked at it as if I knew I

1 had a good second baseman in the minor leagues, and I had a
2 second baseman I was paying \$10 million on my team, am I going
3 to move that second baseman? He's not worth \$10 million to me
4 anymore, but he might be worth \$10 million to someone else.

5 The real issue is what's the value to OPCO as
6 opposed, I think, as what's the value to PROPCO, because nobody
7 has offered any opinion as to what I believe is really fair
8 market value. I know the argument has been raised and well
9 pleaded. I haven't seen it. There's been no expert testimony
10 offered by the objectors. So, solely within the context of how
11 and why all these parties entered into these agreements and the
12 compromise, I think it's relevant for that purpose.

13 I'm not saying, and I don't want to be misunderstood,
14 that I am accepting any of the indicative values. To me, that
15 simply means we did some checking, I relied on the folks that
16 told me, and this is what they think it might be worth for the
17 purpose of negotiations. That's what they mean. Nothing more.

18 And that's how I'm treating it. And candidly, that's
19 not -- when one looks at 701(c), and I -- there was a citation
20 in the points and authorities I think that went to 702, and I
21 think that 701 -- it provides "If the witness is not testifying
22 as an expert," and this one is not, "the witness' testimony in
23 the form of opinions or -- is limited to those opinions
24 or inferences which are rationally based on perception."

25 Well here we know that he didn't perceive a lot of

1 it. He relied upon others.

2 "Helpful to -- and helpful to a clear understanding
3 of the witness' testimony, the determination of a fact in
4 issue." I don't have any trouble with that.

5 And they're not based on scientific, technical, or
6 other specialized knowledge. Well, they're not. They're not
7 based on scientific, technical, or other specialized knowledge
8 because he didn't have it. He so testified. He compiled it,
9 reported it, and these aren't his opinions as to value. And
10 he's not testifying as an expert.

11 And I think that he can simply say what he reported
12 in his representative capacity as a financial advisor because
13 -- was that Blackstone couldn't do this type of work. That's
14 what Genereau testified to.

15 So, for that purpose and that purpose only I'm
16 admitting it. And if it's good foreshadowing argument by the
17 committee. Thank you very much.

18 How much time -- can you tell me the order in which
19 you folks are going to argue?

20 **MS. STEINGART:** Yes, your Honor. I am going to argue
21 on behalf of the committee most of the issues that are before
22 the Court with respect to the motions.

23 Mr. Winston is going to assist me with respect to the
24 topic of excluded assets. And then --

25 **THE COURT:** I assume you've coordinated with

1 Mr. Goldberg.

2 **MS. STEINGART:** And we have coordinated with
3 Mr. Goldberg who will follow. I assume --

4 **THE COURT:** Can you give me an estimate of time?

5 **MS. STEINGART:** -- you know, I assume that
6 Mr. Winston and I together will take less than the two hours
7 that Mr. Kreller and Mr. Aronson took. But not significantly
8 less. Certainly not --

9 **THE COURT:** Does that include Mr. Goldberg?

10 **MR. GOLDBERG:** It does not. Half hour to 45 minutes.

11 **THE COURT:** All right.

12 **MR. KRELLER:** Your Honor, just to --

13 **THE COURT:** And then you'll rebut.

14 **MR. KRELLER:** -- fill that out, we will rebut, but I
15 think before we rebut, you've yet to hear from -- we obviously
16 had our opportunity at the outset of the May 4th or May 5th
17 hearing. Both the OPCO agents steering committee counsel and
18 counsel for the PROPCO lenders as well as counsel for the
19 independent PROPCO directors also have arguments to make. We
20 were going to let them precede our argument.

21 And then the second point, your Honor, if it would be
22 helpful, I'm also prepared at the outset of when we come back,
23 the red lined bid procedures and master lease compromise
24 agreement, I think, do address a number of issues that were
25 contained in the objections. And if the Court would --

1 **THE COURT:** No. I'm going to let them go first.

2 **MR. KRELLER:** -- like to hear that to streamline --

3 **THE COURT:** I'm going to let them go first. You've
4 had your chance. They get to go.

5 **MR. KRELLER:** Trying to be helpful, your Honor.

6 **THE COURT:** I appreciate it.

7 **MR. KRELLER:** Ten, 15 minutes.

8 **THE COURT:** No. I've read it. I know what's in
9 there. I saw most of the -- I saw the 60 days, I saw the 35
10 million. I get it. You know, I really did read those things.

11 Here's what I -- here's what we're going to do.
12 We're going to take a short break. We've been going a couple
13 of hours. Get a chance to get you folks organized and I can
14 get myself a little bit organized. I've got papers all over
15 here.

16 I hope I don't have to flip through too many of the
17 depositions. I've showed you I've annotated them. I know what
18 the witnesses said. I'll have an opportunity at the conclusion
19 of argument to go back and refresh my memory.

20 You've got one issue that you folks need to talk
21 about. I don't -- during your argument because -- regarding in
22 the absence of a sale whether or not, I think it's the put
23 agreement (phonetic). It'd still be -- Paragraph 31 of your
24 response says they can't do certain things, and I'm not sure
25 that that's correct because the other response said "almost

1 certainly," which means that there's a little bit of wiggle
2 room. So, take a look at that, please. I need you to do that
3 for me.

4 What I'm really looking at is about two, two and a
5 half hours from you folks. What I'm going to let you do is I'm
6 going to let the committee go, and we'll go through and finish
7 them. Then I -- then I'll probably let -- a lot of people need
8 -- my staff needs a break.

9 I'm going to ask -- I'll take a break after their
10 argument and pick up with your argument, Mr. Goldberg. And
11 then we'll go right into yours, and we'll go at least until
12 5:00, and we'll see how we're doing then. Then if we need to
13 -- we are, as I told you during the telephone conference
14 Tuesday, we'll come back. I'm going to announce my decision
15 tomorrow. If I have to -- if I need time to finish argument,
16 I'll allow you to finish argument. I'd rather get it done
17 today.

18 I have truly gone through your pleadings. I've
19 checked the cites for the depositions. I -- all the red ink
20 are my notes. So, you're just going to have to accept my
21 representation that I'm pretty well prepared, and I think the
22 arguments are going to be very helpful to me.

23 So, if we can get it done today, and my staff is
24 prepared to work a little later if we have to, but I don't want
25 to take them into -- late into the night if I can avoid it.

1 So, that being said, we'll start again at 11:30.

2 **THE MARSHAL:** All rise.

3 **(Recess taken from 11:06 a.m. to 11:34 a.m.)**

4 **THE COURT:** Please be seated.

5 **(Pause)**

6 **THE COURT:** Please.

7 **MS. STEINGART:** Good morning, Your Honor. Bonnie
8 Steingart on behalf of the Official Committee.

9 In addressing the motions that are currently before
10 the Court, we begin as we must with the process by which the
11 agreements were made. The facts establish that on the OPCO
12 side of the process there was domination by the Fertittas and
13 the controlling lenders. Both groups had a personal agenda to
14 own the OPCO assets and to do so at the lowest possible price.
15 Thus, it cannot be disputed that persons who, in terms of their
16 talents and works, are the major asset and primary drivers of
17 OPCO's business and future hope, the Fertittas were still
18 ostensibly running OPCO, but pursuing their own interests and
19 enrichment.

20 Thus, the evidence shows that Fertitta Gaming was
21 formed with the help of Milbank, and that's Exhibit 16 in the
22 hearing transcript, Page 108, Lines 18 to 12, testimony
23 confirming this by Mr. Haskins, just this fall and then almost
24 immediately Fertitta Gaming engaged in discussions with the
25 controlling lenders, these lenders wearing now their PROPCO

1 hats, to leverage the Fertitta's knowledge and control and day-
2 to-day participation in this business into ownership of almost
3 50 percent of New PROPCO at prices below what is -- what are
4 currently plan value. It is clear that in this regard,
5 Mr. Frank Fertitta was not wearing his OPCO hat when pursuing
6 the opportunities for himself. And this is true despite the
7 fact that Mr. Fertitta has an employment agreement with SCI,
8 and that employment agreement is now Exhibit 73 before the
9 Court. In that employment agreement there's a description of
10 Mr. Fertitta's responsibilities, and those responsibilities are
11 to devote time and attention to OPCO, to SCI, and to promote
12 the company's interests, and that's at Section 2.3 of
13 Mr. Fertitta's employment agreement, Pages 5 to 6 of that
14 agreement, which is Exhibit 73.

15 In addition, under the employment agreement,
16 Mr. Fertitta also has an obligation during the term of his
17 employment and for 12 months thereafter not to use, or make use
18 of any confidential information in connection with any business
19 activity, other than that of SCI, of OPCO. And that's in
20 Section 11.1 of the employment agreement, Exhibit 73, at Page
21 17.

22 Mr. Fertitta's entity, Fertitta Gaming, has been set
23 up to be nothing less than a direct competitor of OPCO and
24 there's testimony about that from Mr. Haskins during the
25 hearing at Page 131, Line 12 to Line 18. And Mr. Fertitta is

1 lending his knowledge of SCI's confidential information to that
2 enterprise to assist to obtain -- and that enterprise being
3 Fertitta Gaming, to assist to obtain those assets for himself,
4 all in abrogation of his employment agreement and his
5 responsibilities to SCI. As testimony at the hearing has
6 demonstrated, the Fertittas participated in the OPCO Board
7 Meetings and OPCO votes concerning the second master lease
8 compromise amendment, the bidding procedures and the OPCO Plan
9 Support Agreement, each of which provides significant personal
10 benefits to the Fertittas and Fertitta Gaming, and each of
11 which has a major impact on the value and prospects of OPCO.

12 The OPCO Plan Support Agreement between Fertitta
13 Gaming and Deutsche Bank JP Morgan on the one hand was
14 developed with the help of Milbank preparing drafts, a draft
15 prepared by Milbank is Exhibit 12, even though no debtor was or
16 is a party to that agreement, but Fertitta Gaming and the
17 Fertitta owner. The evidence was also established during the
18 hearing that Milbank continued its ongoing representations of
19 Fertitta --

20 **THE COURT:** Excuse me. You're talking about the OPCO
21 Support Agreement?

22 **MS. STEINGART:** I'm talking about the PROPCO Plan
23 Support Agreement.

24 **THE COURT:** I thought you said OPCO.

25 **MS. STEINGART:** I'm talking about --

1 **THE COURT:** PROPCO. That I agree, that they're not
2 parties. I know they're parties to the OPCO. Go ahead.

3 **MS. STEINGART:** Right. Milbank continued its ongoing
4 representation of Fertitta interest in numerous other business
5 and personal matters, and that's set forth in Exhibit 17 and in
6 the hearing transcript at 111 Line 13, to 114 Line 8.

7 Lazard testified here and, as Mr. Haskins confirmed,
8 Lazard was advisor to both OPCO and PROPCO and is receiving
9 transaction fees from both. And the transaction fee issue, as
10 the Court is aware, is embedded in the OPCO Support Agreement
11 term sheet, which is Exhibit 5, and I think it's at Page 50 of
12 that agreement, which is Exhibit 5. PROPCO Banks and Fertitta
13 Gaming started their campaign to own OPCO and to obtain
14 excluded assets.

15 Mr. Haskins, who is executive vice president, general
16 counsel and secretary of OPCO, has been employed by OPCO for 15
17 years, has for a number of years reported directly to
18 Mr. Fertitta, has had frequent business dinners with
19 Mr. Fertitta and some social contact, and expects to continue
20 in the employ of either OPCO or PROPCO, was authorized to be a
21 primary negotiator on behalf of OPCO. We've also seen that
22 Mr. Haskins is a director of PROPCO and by resolution
23 Mr. Haskins was authorized to negotiate plan documents on
24 behalf of PROPCO.

25 As Mr. Kreller recognized when the debtors did their

1 openings here, under circumstances where insiders have
2 fiduciary duties, but so involve themselves in decisions that
3 are beneficial to the insiders, a higher standard of review and
4 scrutiny is applied in looking at such decisions and the burden
5 is placed on the debtors to show entire fairness. This
6 standard is echoed time and again in bankruptcy cases where
7 courts are asked to review and approve insider deals. And we
8 have numerous citations to such cases in the briefs that we've
9 submitted to the Court.

10 Here the impact of insider participation was
11 heightened by the dual interests of the controlling lenders and
12 the divided loyalty of Mr. Haskins and Lazard. And that, Your
13 Honor, was the point of the chart that we marked as a
14 demonstrative as Exhibit 19 and that we used during the
15 testimony of Mr. Haskins at Page 127 Line 19 to Page 131 Line
16 9. Even more disappointing, Your Honor, is that each of OPCO
17 and its professionals, and the Fertittas knew, that these
18 issues were present and that these issues were troublesome and
19 could have ameliorated the impact by including the committee in
20 matters involving OPCO assets, could have involved the
21 committee in pricing those assets, could have involved the
22 committee in creating bid procedures, and could have involved
23 the committee in the discussion of stalking horse arrangements.
24 I've represented a number of committees over a many years,
25 committees who have, according to debtors, been both in and out

1 of the money, and we will get into whether this committee is in
2 the money in a moment, but never as counsel for an official
3 committee have professionals on the committee been so
4 disregarded by a debtor.

5 When identifying and segregating what have become the
6 excluded assets, the committee should have been included and
7 consulted. These are OPCO's assets. Mr. Friel, in his
8 affidavit, indicated that these are OPCO assets, the A&M Report
9 refers to them as OPCO assets, and as the Official Committee we
10 are charged with helping to preserve and maximize the estate.

11 **THE COURT:** The same report that I said I'd allow in
12 over objection?

13 **MS. STEINGART:** But there's --

14 **THE COURT:** Just want to make sure.

15 **MS. STEINGART:** All right.

16 **THE COURT:** Okay.

17 **MS. STEINGART:** When valuing or coming to a price for
18 those assets, the committee should have been included and
19 consulted. Why that didn't happen is a mystery. Whether they
20 took our suggestions or not would certainly have been up to
21 them, but never to have been at the table and not to have seen
22 any of this until it was filed after it was filed with the
23 Court raises serious issues. Same is true with bidding
24 procedures. That will govern how OPCO assets are marketed. No
25 reason not to include the committee. And this is also true of

1 a stalking horse bid.

2 The one participant in these proceedings that the
3 debtors could have pointed to and said these people had only
4 OPCO at heart, these people were consulted, were not. And as a
5 result of that, I think that we have another issue that's
6 presented because this too undermines the process. It
7 undermines the process that's contemplated by the code and the
8 ability of the arrangements that have been presented to the
9 Court to pass muster.

10 I'd like to raise and mention a case that we have not
11 cited, Your Honor, and that is In Re Nutritional Sourcing Corp.
12 It's at 398 B.R. 816 and it's a decision by Judge Walsh in
13 Delaware, and I think it's instructive as to 9019. In that
14 case, the debtors proposed a specific definition in their plan
15 for a type of trade claim. The definition was crucial, because
16 creditor holding those claims that were within the definition,
17 would get 100 percent recovery, while those who were general
18 unsecured outside the definition would get approximately 10, 12
19 percent. The plan proponents defended the deposition of the
20 trade claims as a reasonable compromise and the subject of good
21 faith negotiations. However, in denying the motion to approve
22 the settlement, Judge Walsh explained that under Rule 9019, the
23 Court should look to the fairness of the settlement to other
24 persons, to the parties who did not settle. He explained that
25 the plan proponent's definition of trade claim severely impacts

1 non-good trade creditors or the ones that were general
2 unsecureds who were not at the negotiating table and who were
3 not adequately represented in their assets.

4 Now here, if we look at our case for a moment, Your
5 Honor, the people at that negotiating table were the debtors,
6 dominated by the insiders and with divided loyalty, and we had
7 the OPCO lenders who were protecting the OPCO lender interests.
8 We certainly can't fault them for protecting their own
9 interests, but the interests that the committee had in having -
10 - in negotiating what should be an excluded asset and being at
11 the table to participate in that discussion and to have input
12 and to have tried to make it otherwise, or the pricing and how
13 the pricing was done and to try to make it otherwise, means
14 that in coming to this decision or agreements that are before
15 the Court, an important voice was not heard and that is a
16 problem of process.

17 Judge Walsh found that the impact of the definition -
18 - and here, the impact of those excluded assets -- were so
19 great that the loss of that voice at the table made the
20 settlement not fair and equitable. And I think that that case
21 has currency here, Your Honor, and that that concept --

22 **THE COURT:** Well, I think that clearly falls within
23 the fourth prong of the test articulated by the Ninth Circuit
24 in A&C Properties, because really the four prong test is driven
25 to allow the Court to make a determination that the settlement

1 is fair and equitable. So I -- that would be consistent with
2 the -- all that I've been applying here for about 15 minutes.

3 **MS. STEINGART:** I think it is consistent, but I think
4 that Judge Walsh was confronted with a situation where a group
5 -- where even though the debtors were at the table, the debtors
6 were not adequately protecting a voice that --

7 **THE COURT:** No, that's why I'm saying it goes to the
8 fourth prong.

9 **MS. STEINGART:** -- yeah. Right. Exactly.

10 **THE COURT:** Paramount interest of creditors.

11 **MS. STEINGART:** Right. Right. And from an
12 evidentiary point of view, why is all this important? It's
13 important because we know that the burden is on the debtors to
14 establish the fairness and the appropriateness of this. And in
15 the context we're in now, that burden is heightened and we'll
16 get to pointing out the portions of these agreements that have
17 signs of value forfeiture and insider favoritism, things that
18 the debtors like to pejoratively refer to as the committee
19 cherry picking, but they demonstrate that the debtors cannot
20 meet the standard of fairness, let alone entire fairness.

21 **THE COURT:** When making an analysis of what's fair
22 and equitable, and also good faith, and I look at the Health
23 Co. case for assistance with that, should a court attempt to
24 analyze or consider what would occur in the absence of the
25 settlement?

1 **MS. STEINGART:** Well, I think, Your Honor, under the
2 circumstances that we have present in this case that it is
3 fortunate that the debtors are doing well, in terms of their
4 business, that they have been, as I read the monthly operating
5 reports, they have been performing to expectation, and that the
6 markets are improving and that, to the extent that the Court
7 determines we need here a do-over, and it takes several weeks
8 to present the Court with that do-over, because I think that
9 the parties here are talented enough and smart enough to do
10 that if it's necessary, that what we will have is a four- to
11 six-week bump in the timeframes that are before the Court.
12 There is nothing currently on the debtors' plate that is going
13 to make the debtor -- with that additional time period that
14 might be required to bring new arrangements before the Court,
15 that's going to be a terrible disadvantage to it. So I don't
16 think that there is --

17 **THE COURT:** So I should consider it, but I should put
18 it in the context of circumstances the evidence of this case is
19 what you're telling me?

20 **MS. STEINGART:** Right. Right. And I think that the
21 circumstances of this case are that if you don't approve the
22 agreements, the sky is not going to fall. I think that the
23 parties here are interested enough in pursuing the kinds of
24 transactions that have been suggested in these agreements and
25 that can still be pursued if presented in a way that I think is

1 better justified and more fair and, you know, better -- there's
2 evidence that the pricing is appropriate. I think that this
3 can be done, but I don't think it has been done. And I don't
4 think that asking them to do it or requiring them to do it is
5 going to present damage.

6 **THE COURT:** As I read your pleadings I was struck by
7 one question and I don't mean this facetiously at all. If the
8 price being that was being paid for the excluded assets was
9 higher would there be an objection to the bidding procedures,
10 the restructuring agreement and the compromise? My question
11 is, are we simply discussing price? Because I haven't seen,
12 candidly, a evidentiary basis that credibly attacks the
13 practicality. I understand the position regarding parties on
14 both sides of the table. I understand that. I'm familiar with
15 Exhibit 19, you've made that point, and I'm not disregarding
16 that point, but there is business and economic reality. And my
17 question to you very bluntly is, if in fact the committee had
18 been at the table and if it had been able to achieve a higher
19 price and perhaps be satisfied that the Texas put situation is
20 real and something has to be done about it because bidders want
21 to know so they don't have to worry about what may happen a
22 year now when all of a sudden they get a demand to make a
23 payment of millions of dollars, if the committee had
24 participated and had they been able to achieve higher price,
25 would we be in the process as you have identified had been, in

1 your mind, fair and more inclusive, would I still be hearing
2 the objections? I'm trying to find out really what is at the
3 heart of this.

4 **MS. STEINGART:** Right. I think there -- I think
5 price and process dovetail in certain respects, Your Honor.

6 **THE COURT:** I don't disagree.

7 **MS. STEINGART:** I think that to the -- you know, and
8 when I say price and process, I don't only mean the creditors
9 committee being at the table. I mean the process by which the
10 auction is held and the impact of the excluded assets on that
11 process of --

12 **THE COURT:** I haven't seen really the objection not
13 so much to the process itself, especially now with the length,
14 and I've gone through and read even the bidding procedures and
15 don't -- and I under -- and I've read your redline and I think
16 a lot of it's been addressed and there are a couple of issues
17 that I have. I'm still concerned a little bit about the
18 control that the debtor might have as opposed to me. If I'm
19 going to do the auction, I will control the auction. That's a
20 foreshadow.

21 **(Laughter)**

22 **THE COURT:** That -- but I'm really trying to find out
23 exactly what we're talking about here.

24 **MS. STEINGART:** Right.

25 **THE COURT:** And it strikes me, when I read

1 everything, that these are good arguments. We just -- we had
2 these discussions in December, you know, leverage and being
3 able to get to the table and you know, because I placed it on
4 the record, that's why I didn't enter a final ruling on the SDN
5 Motion. And I am concerned about process; I've been concerned
6 about process throughout this case and I don't think that
7 that's a surprise to anybody sitting in this courtroom. But I
8 will tell you my -- just so you have some understanding of how
9 I'm looking at this, that it seems to me that if the price were
10 better -- and it's a finite number. I understand there's no
11 expert opinion, but what is the real value of the computer
12 system that's in two properties that may be owned by New
13 PROPCO, the others at Texas, are we going to rip it -- you
14 know, you could probably have five guys tell you five different
15 ways of doing it, but we know that there's going to be some
16 expense involved and the real question is, who's negotiating
17 that. That's what you're really telling me.

18 And if I understand -- so I want to make sure I
19 understand. If you could negotiate and you were convinced by
20 your participation yeah, this is not a bad deal, then I'm not
21 sure we'd be having these objections.

22 **MS. STEINGART:** Yes, Your Honor. I think that is a
23 component -- an important component of the objection. If we
24 thought the price for the excluded assets was a fair price, and
25 the process for keeping them out of the auction or including

1 them in some form was a fair process, so that we could optimize
2 what we were receiving on the other end, that would be
3 significant. But --

4 **THE COURT:** What's the -- go ahead. I don't mean to
5 cut you off. Go ahead.

6 **MS. STEINGART:** But just so that I can foreshadow a
7 little something I'm going to get to in --

8 **THE COURT:** No, tell me.

9 **MS. STEINGART:** -- a minute or two, part of the issue
10 with the excluded assets is the optionality in the hands of
11 PROPCO because as you could see from the revised bidding
12 procedures, PROPCO can take them or not take them. And I think
13 that you have to fish or cut bait on that a little sooner,
14 because if they're not going to take them, they should be in
15 the auction.

16 **THE COURT:** You mean the excluded assets?

17 **MS. STEINGART:** The excluded assets. So I think
18 that, you know, that we have a confluence of a couple of things
19 here and I think that you can make the moving parts work, I
20 agree. I agree that they can work. I think that if we had --

21 **THE COURT:** Notwithstanding that you may have an
22 affiliate that is one of the potential participants in the
23 purchase.

24 **MS. STEINGART:** Yes, I agree.

25 **THE COURT:** Because there's real money in here. I

1 mean, let's not disregard what's happening here. I mean, it's
2 easy to say things, but there's real money in the pot here too.

3 **MS. STEINGART:** And we're going to talk about that in
4 a minute or two. Yes, there is real money here and, you know,
5 and I don't for a moment dispute the desire of the stalking
6 horse to own the assets. And when I say the "stalking horse" I
7 mean --

8 **THE COURT:** I understand.

9 **MS. STEINGART:** -- the combined entity, nor do I --
10 but also I think that given other things we've seen that other
11 people want to own it. And so the question is, when you have
12 that, Your Honor, you do have situation where if bidding is
13 transparent and fair, you get to higher numbers. And some of
14 the higher numbers that you've seen, that we've submitted under
15 seal, put us in the money. I want that opportunity. I think
16 that before we --

17 **THE COURT:** Let me ask you this question.

18 **MS. STEINGART:** Uh-huh.

19 **THE COURT:** We're -- because we're talking about what
20 I think is germane. The sale is contingent upon a confirmed
21 plan of reorganization. I know that's one of the basis of your
22 objections. I look at it a different way, I look at it as a
23 protection. And I think that's what the Supreme Court of the
24 United States has said, I think that's what the Ninth Circuit
25 has said, I think that's what the Ninth Circuit has said and

1 what I've said in cases I've had in front of me, the plan
2 process is supposed to ensure due process, transparency.
3 That's why I like auctions in the courtroom, that's why I like
4 to have a hand in them. Some judges don't believe in that. I
5 actually think that that is a preferable for -- especially in
6 the bankruptcy setting.

7 To make a determination that the process worked,
8 would have to be, I would think, the critical issue before that
9 I -- before I could ever confirm the plan of reorganization.
10 So as I was thinking through everything that I've read, should
11 the process go forward, assuming that I find that bidding
12 process works, and we see what the result is, because then I
13 won't be speculating; I'll know whether it worked or it didn't
14 work. And that delay also, based upon what you just told me,
15 would not be all that significant. If it didn't work, fine.

16 **MS. STEINGART:** Right.

17 **THE COURT:** Start over. So --

18 **MS. STEINGART:** Right.

19 **THE COURT:** -- that's what I'm weighing. Do you
20 think I'm --

21 **MS. STEINGART:** But -- and, Your Honor --

22 **THE COURT:** -- because understand, I don't think it's
23 arguing with me if you tell me no, I understand what you're
24 saying, but I don't think it works. I need -- I'm asking for
25 your opinion as a regard.

1 **MS. STEINGART:** Right. And my view of that, Your
2 Honor, I think yes. I think that we don't need to deal with
3 master lease compromise today. I think the current master
4 lease compromise can be extended. It certainly pays a rent
5 that PROPCO has orally found to be sufficient and one that the
6 debtor can afford to pay or OPCO can afford to pay, excuse me.

7 **THE COURT:** Yeah, because there are benefits -- there
8 is a reduced rent. There are benefits in there, we know that.

9 **MS. STEINGART:** But they're marginal. It's a
10 marginal benefit. It's a million or a million-and-a-half --

11 **THE COURT:** Maybe.

12 **MS. STEINGART:** -- a month.

13 **THE COURT:** I understand.

14 **MS. STEINGART:** Okay. But the other things that --
15 the dragalong, tagalong, which we'll talk about in second
16 master lease, I think is inappropriate.

17 **THE COURT:** I just wanted you --

18 **MS. STEINGART:** Okay.

19 **THE COURT:** I wanted everybody here to understand at
20 least some of the thoughts that I've applied to this process
21 because I really do believe in the process.

22 **MS. STEINGART:** Right.

23 **THE COURT:** And I think before I would ever confirm
24 the sale, I'd have to -- I would have -- finalize the sale, I
25 guess, I would have to confirm the plan of reorganization and

1 that would take a hard look at. The sale is not final, it's
2 just like the point that was made, you know, the process that
3 has been gone through -- that has already been exercised by the
4 people that you think excluded you, only came up -- a stalking
5 horse bid came up with a compromise. The sale has not occurred
6 and the sale will not occur unless I confirm the plan. And the
7 plan is going to have to satisfy 1129(a)(1) and (a)(2), as well
8 as (a)(3), which deals with some of the issues you've already
9 mentioned to me today. And that's -- I keep placing it in the
10 context of plan confirmation.

11 **MS. STEINGART:** Your Honor, I understand that you
12 place that -- that you place it in that context. I think that
13 the master lease compromise agreement and OPCO Plan Support
14 Agreement, in a sense, limit the Court's flexibility in terms
15 of when you get to confirmation. So putting those aside and
16 just looking at the auction -- let me just look at the auction.

17 **THE COURT:** No, I'm going to let everybody -- I'm not
18 going to interrupt. I try not to anyway.

19 **MS. STEINGART:** Right.

20 **THE COURT:** I thought everybody at least have some
21 idea of how I'm looking at this.

22 **MS. STEINGART:** All right.

23 **THE COURT:** And then you can tell me if I should look
24 at a different way.

25 **MS. STEINGART:** Right. And just looking -- there's

1 no reason why an auction should not proceed, but that auction
2 can proceed in the face of the excluded assets, unless those
3 have priced in a way that is appropriate --

4 **THE COURT:** How do you know that?

5 **MS. STEINGART:** -- and that meets the standard.

6 **THE COURT:** How do you know that? That's --

7 **MS. STEINGART:** I know that because -- well, just
8 stepping back for a moment. If we look at the amended bid
9 procedures, while the amendments do, and the fix that they try
10 to create it, is one where if the stalking horse wins, well the
11 stalking horse just gets it all. Competing bidders now are
12 bidding for the whole package and if what happens is they win,
13 they get to think about oh, I have the whole package unless
14 PROPCO decides that it wants the bucket of assets, okay?

15 Now, the problem with the assets being priced at 35
16 is that if a competing bidder thinks they're worth 100, they're
17 only going to put 35 in their bid for the excluded assets. I'm
18 not getting, as a creditor of OPCO, the benefit of their view
19 that the excluded asset is worth 100. Now they can decide it's
20 worth 100 and then if PROPCO still wants it, PROPCO can have
21 it, but I don't want the price or the package of assets to be
22 capped at an artificially low price because this bucket that
23 now, in the revised procedures, everyone will be included, is
24 called 35. I want that bucket called 100. I want that bucket
25 called 75. I want it called whatever the winning bidder is

1 willing to call it.

2 And then if PROPCO wants to have the right to buy it
3 at that price --

4 **THE COURT:** In other words, do you want a segregation
5 of the bid to indicate what the bid would be with or without
6 the excluded assets?

7 **MS. STEINGART:** I think that that might help us value
8 the excluded assets, but --

9 **THE COURT:** Because right now if PROPCO -- under the
10 revised bidding agreement, if PROPCO purchases -- New PROPCO
11 purchases the excluded assets, it pays 35, assumes 13 million
12 in debt, at least \$48 million in --

13 **MS. STEINGART:** Well --

14 **THE COURT:** Let me finish.

15 **MS. STEINGART:** Yeah.

16 **THE COURT:** And the 35 million becomes cash that
17 belongs to the buyer and is subject to the security interest
18 that OPCO Lenders have.

19 **MS. STEINGART:** Right. But it caps -- it
20 artificially caps the price for OPCO assets. If those -- if
21 that -- if you just think of it, if those -- and forget about a
22 bidding process. Your Honor, you asked me before if I was at
23 the table and I was satisfied with the price of that excluded
24 assets and then we went into the auction with the exact
25 framework that we have now with respect to bidding -- there are

1 other things about the auction that we'll talk about -- would I
2 be satisfied. And my answer is yes, because I would be
3 satisfied that the whole package for OPCO assets was the
4 highest, best price, but if the excluded assets should really
5 be 100 million, I'm 75 short. And it's those little 75 million
6 increments that these people are willing to give away that get
7 me to be in the money.

8 **THE COURT:** It's actually like 65 or 53.

9 **MS. STEINGART:** Yeah, right.

10 **THE COURT:** Ten million here and there, it adds up.

11 **MS. STEINGART:** Well, you know, the range was 34 to
12 60 -- you know, was --

13 **THE COURT:** About 63, I think.

14 **MS. STEINGART:** Yeah, but it didn't include a lot of
15 stuff.

16 **THE COURT:** I understand, I read your pleading. I
17 know what --

18 **MS. STEINGART:** Yeah, yeah, okay. So it could be
19 much higher. That's why it has a pernicious effect.

20 **THE COURT:** Okay.

21 **MS. STEINGART:** That's why it has a pernicious
22 effect, even in the context now --

23 **THE COURT:** What you're saying is it would
24 artificially lower the bid. That's what you're telling me.

25 **MS. STEINGART:** Yes. Yes. And I think that -- you

1 know, and I also think that at this point there's not enough
2 information for the Court to make a decision about the range of
3 reasonableness, and that is something that Mr. Winston will get
4 to.

5 **THE COURT:** Oh, I assumed he would.

6 **MS. STEINGART:** Yeah. You know, but that is, you
7 know, that's an important component of our position here. So,
8 you know, the Court does understand the significance of the
9 process. I was going to allude to something that one of my
10 professors used to say, that process is about -- it's important
11 because if you don't do it right, you don't get it right. It's
12 not just, you know, that you're playing a game and you have to
13 get your foot in the line. It's that if you don't hear from
14 everyone and take those interests into account, then chances
15 are you're going to come up with something that's not going to
16 pass muster.

17 And let's start with how this doesn't pass muster.
18 Let's start with the second master lease compromise amendment.
19 Now to the extent that the Court is not inclined to deal with
20 it at this point, or the Court is inclined to sort of do this
21 in confirmation, I certainly don't want to take a lot of time.

22 **THE COURT:** No, you better address it.

23 **MS. STEINGART:** I'm sorry?

24 **THE COURT:** Address it.

25 **MS. STEINGART:** Okay. Well --

1 **THE COURT:** I mean, I've read your pleadings, it's
2 been addressed at length.

3 **MS. STEINGART:** Right.

4 **THE COURT:** I don't --

5 **MS. STEINGART:** Right.

6 **THE COURT:** -- if you can --

7 **MS. STEINGART:** Right. And I will address the
8 amendment because right now, Your Honor, it's still not right.
9 Right now, the fixes have not fixed the problem. OPCO still
10 remains at risk of being required to provide substantial
11 transition services at the whim and caprice of the Fertittas
12 and Deutsche Bank and JP Morgan.

13 **THE COURT:** Doesn't OPCO already have that obligation
14 pursuant to an order that I entered on the first compromise?

15 **MS. STEINGART:** Not at the whim and caprice. In the
16 first compromise agreement, Your Honor, the trigger for
17 transition service was rejection. Now, the trigger for
18 transition are many events that have nothing to do with what
19 OPCO does and indeed what PROPCO does. Now we had lengthy
20 examination of Mr. Haskins about the PROPCO Plan Agreement,
21 right, and how the PROPCO Plan Agreement was being used in
22 Exhibit C to the master lease compromise to create risks and
23 perils to OPCO that were unrelated to rent and unrelated to any
24 breach or failure of OPCO to do what it was supposed to do
25 under the master lease.

1 And so there's been an amendment. And there's been
2 an amendment to Section C, okay, and I'm going -- I'm just
3 going to address that. I don't know if the Court has the
4 amendment before it.

5 **THE COURT:** Hold on a second. Are you talking about
6 the redline --

7 **MS. STEINGART:** I am --

8 **THE COURT:** -- that I've utilized, Docket Number
9 1522?

10 **MS. STEINGART:** Well, what I'm talking about now is
11 the new redline. There's the old redline that we prepared for
12 the Court that we marked as --

13 **THE COURT:** This is May 24th. It couldn't be much
14 newer than this.

15 **MS. STEINGART:** Right, May 24th is the new redline.

16 **THE COURT:** Okay. I've read it.

17 **MS. STEINGART:** Okay. So if we could look at Exhibit
18 C together, Your Honor.

19 **THE COURT:** C?

20 **MS. STEINGART:** C, which is Page 58 of 78.

21 **THE COURT:** I've already marked it. I'm there.
22 Okay.

23 **MS. STEINGART:** So Exhibit C are transition events.
24 And what we have here is the removal -- if we look at Number 1,
25 we have the removal or the ostensible removal, of the plan

1 support agreement as a trigger for -- or termination of the
2 plan support agreement as trigger for transition service. But
3 lo and behold, Your Honor, if we look at Number 2, the
4 provisions of Number 2 bring back the plan support agreement
5 and we're going to have to work through a couple of documents
6 here, because it's not straightforward. What Number 2 of
7 Exhibit C says is if the proposed plan, as may be amended
8 pursuant to the terms of the plan support agreement, okay which
9 we both now understand are -- is the PROPCO Plan Support
10 Agreement, is confirmed the effective date of the proposed plan
11 shall not have occurred prior to January 3rd.

12 So that would be a transition event, no problem
13 there, but let's get to Number 2. Number 2 says at any time
14 prior to such date, so at any time prior to January 3, 2011,
15 any of the conditions to the effectiveness of the proposed plan
16 are no longer capable of being satisfied, okay. Now, Your
17 Honor, if we look at the proposed plan, one of the conditions
18 to effectiveness is PROPCO Plan Support Agreement. So if
19 PROPCO Plan Support Agreement is terminated for any reason at
20 all, this provision is triggered. And I can walk the Court
21 through the proposed plan that's on file with the Court to show
22 you how that happens.

23 **THE COURT:** No, that's fine.

24 **MS. STEINGART:** The proposed plan, which was filed
25 with the Court on March 24th --

1 **THE COURT:** As I've indicated, I reviewed that before
2 today's hearing.

3 **MS. STEINGART:** Okay. So if we look at Article IX,
4 which are conditions precedent to plan confirmation, and
5 Article IX, Part B talks about conditions precedent to the
6 effective date and consummation of the plan, which is what's
7 referred to in Number 2, and we go to Item 4, that item says
8 all actions necessary to implement the plan, shall have been
9 effected, including without limitation the restructuring
10 agreement. And the restructuring agreement is defined in the
11 plan at Page 21, Number 143 of definitions, as that certain
12 agreement between Fertitta Gaming and the mortgage lenders, so
13 it's the PROPCO Plan Support Agreement.

14 **THE COURT:** I understand.

15 **MS. STEINGART:** Okay. So all of the infirmities that
16 we spoke about during cross-examination and that are -- haven't
17 been eliminated, okay, it hasn't been fixed.

18 Now -- and, you know, as a result of that, you know,
19 OPCO is exposed if someone decides to pull their equity
20 commitment to doing transition service. There's no reason for
21 that. They're exposed if people aren't satisfied with dozens
22 and dozens of documents to do transition service. There's no
23 basis for that. There was testimony by Mr. Haskins that the
24 board did not discuss the termination events that would lead to
25 transition events in Exhibit C. They didn't talk about that to

1 make a determination about whether the second master lease
2 compromise was fair and reasonable to OPCO. And that's at Page
3 173, Lines 17 to 25.

4 Let's look at some other purported fix with respect
5 to the master lease compromise. Let's look at Number 4 that
6 has now been added to Exhibit C. Another transition event is
7 now further tied to the proposed plan rather than to
8 obligations that exist under the master lease, okay. And on
9 Number 4 we have -- you know, so it sort of makes the master
10 lease compromise a plan support agreement from the consequences
11 that follow from OPCO at any time withdrawing its support for
12 the proposed plan. OPCO --

13 **THE COURT:** What'd you just say?

14 **MS. STEINGART:** Number 4 says PROPCO or SCI at any
15 time withdraws or revokes the proposed plan or announces their
16 intention not to support the proposed plan.

17 **THE COURT:** Right.

18 **MS. STEINGART:** Or files a different plan.

19 **THE COURT:** Either of the debtors?

20 **MS. STEINGART:** Either of the debtors. The master
21 lease compromise is an agreement that amends the master lease.
22 It's not a plan support agreement. There are other plan
23 support agreements and there's no reason why the master lease
24 compromise agreement should become a plan support agreement.
25 You know --

1 **THE COURT:** This indicates that if either of the
2 debtors withdraws, revokes or renounces its intention not to
3 support the proposed plan, or files a plan other than the
4 proposed plan, the transition starts. What you're saying is,
5 is this is included as a transition event, that that means that
6 the compromise agreement then becomes --

7 **MS. STEINGART:** A plan support agreement.

8 **THE COURT:** -- a plan support agreement. All right.

9 **MS. STEINGART:** And the question is, why? Why should
10 that be? Why should OPCO be exposed to do transition events
11 unless there is a trigger that's related to their performance
12 of their obligations under the master lease or confirmation or
13 rejection of the lease? I mean, certainly that -- you know,
14 we're not tussling --

15 **THE COURT:** Well, rejection --

16 **MS. STEINGART:** -- we're not tussling with those
17 triggers, Your Honor.

18 **THE COURT:** Under your parade of horrors, would
19 that mean then if OPCO just said okay, we no longer intend to
20 support the plan, that would then trigger the transition event
21 and OPCO would have to provide transition events that it would
22 not have been obligated to provide under the order approving
23 the first compromise?

24 **MS. STEINGART:** Exactly right, Your Honor. Here
25 again, Mr. Haskins testified that when the board voted to

1 approve the second master lease compromise, it did not walk
2 through the various transfer provisions that were in Exhibit C,
3 and that's at 181 Line 8 to Line 18. You know, of course these
4 have changed somewhat, so we're talking about the prior
5 version.

6 **THE COURT:** Yeah. Let me ask you this question again
7 -- be asking the same thing on the other side -- the master
8 lease compromise agreement -- or the second does not tie
9 directly to plan confirmation like the sale does? I mean, ask
10 to approve that compromise now, am I correct?

11 **MS. STEINGART:** The compromise agreement as it exists
12 now, I do not believe it is tied --

13 **THE COURT:** It's a standalone, in a sense.

14 **MS. STEINGART:** It's a standalone, but certainly it
15 can be dealt with in confirmation.

16 **THE COURT:** And that's -- that's what I'm asking you.

17 **MS. STEINGART:** Uh-huh.

18 **THE COURT:** If, I would say, I should include that
19 agreement as part of the overall plan confirmation analysis,
20 would that not provide the process that you're concerned about?

21 **MS. STEINGART:** Right. I --

22 **THE COURT:** Is that a yes or no?

23 **MS. STEINGART:** Right.

24 **THE COURT:** I'm reading all these depositions where
25 people ask that.

1 **MS. STEINGART:** Yes. My answer to that is yes.

2 **THE COURT:** Okay.

3 **MR. WINSTON:** To the extent that it remains in its
4 present form and any other -- and anything in addition to that
5 is dealt with at plan confirmation, I have no -- I have no
6 objection to that.

7 **THE COURT:** Thank you.

8 **MR. WINSTON:** Okay. And the same is true as we
9 discussed during testimony with respect to transfer events.

10 **THE COURT:** Transfer is different than transition.

11 **MS. STEINGART:** Transfer is different indeed, Your
12 Honor.

13 **THE COURT:** Transition is simply -- well, it's been --
14 -- I first dealt with this at the hearing we had -- what was
15 that, December 11th, I believe it was. This is a bridge, those
16 bridges -- like that bridge they're building out south of town,
17 it just gets longer and longer, which is not bad in and of
18 itself, but it is a bridge and the transition events were
19 intended -- this is what I was told -- to allow the new entity
20 or I guess the PROPCO Lenders if they foreclose, the ability to
21 maintain operations, to keep people employed, to satisfy the
22 regulatory agencies. That doesn't seem like such a horrible
23 thing to me.

24 **MS. STEINGART:** It's not a horrible thing, Your
25 Honor. We support that. There's no reason why that shouldn't

1 happen. And to the extent that people want to change that from
2 150 days to 170 days as part of the confirmation, we have no
3 problem with that, and until that point, you know, nothing
4 adverse can happen without Your Honor being aware of it.

5 **THE COURT:** Then what bothers you about the
6 transition events; that they impose a potential burden upon
7 OPCO?

8 **MS. STEINGART:** Right.

9 **THE COURT:** Isn't there consideration for that?

10 **MS. STEINGART:** Less now than there was before.

11 **THE COURT:** So that would be yes, but you don't think
12 it's enough?

13 **MS. STEINGART:** Yes, but it's not enough. And -- and
14 again, that can be dealt with in confirmation, because nothing
15 untoward can happen before then. And at that time, it's part
16 of a plan, it's part of a process that's before the Court and
17 the changes suggested here can certainly be part of that
18 process.

19 **THE COURT:** Go ahead.

20 **MS. STEINGART:** You know, so then we get to transfer
21 events, Your Honor, okay. Transfer events are another problem
22 within the master lease compromise and something that we talked
23 about during the hearings on May 4th and 5th.

24 **THE COURT:** Transfer events are in MX, I believe it
25 is --

1 **MS. STEINGART:** Exactly, Your Honor. And during the
2 cross of Mr. Haskins, Mr. Haskins conceded that transfer events
3 had nothing to do with the payment of rent at Page 177, Line 4
4 to Line 7, but rather incorporate provisions from the OPCO Plan
5 Support Agreement. That's really what Provision MX is, just a
6 taking of provisions of OPCO Plan Support and putting it in the
7 master lease compromise. Again, the use of the master lease
8 compromise not for what it's original purpose is, but as a tool
9 for a plan support agreement.

10 You know, here again, you know, to the extent that
11 excluded assets are going to get transferred, it certainly
12 doesn't have to be part of a master lease compromise agreement.
13 In the amendment that was first put before the Court hasn't
14 been changed, we had the beginning of the optionality for OPCO.
15 So in the master lease compromise that exists now there are no
16 transfer events and there's no ability for OPCO to take or
17 leave -- I'm sorry, there's no ability for PROPCO to take or
18 leave the assets, okay. And in the revision that was filed
19 with the Court that -- on April 16th, PROPCO all of a sudden
20 has this optionality of taking transferred assets or not. And
21 if they don't, where that leaves OPCO is unclear, but we'll get
22 more to that when we get to bidding procedures.

23 And again, you know, and I may have misspoke before,
24 Mr. Haskins said that the transition events weren't discussed
25 at the board and he also said the transfer events were not

1 walked through so that they could be -- so that the board could
2 assess what the reasonableness was of the transfer events to
3 OPCO.

4 To the extent that assets are to be added to the
5 current list in the master lease compromise agreement because
6 the excluded assets are an expansion of that list and the
7 package is to be priced and sold to New PROPCO in the event
8 that Fertitta Gaming and the controlling lenders don't win the
9 bid, that package should be subject to a fair valuation and to
10 a fair price before it can begin to dictate the results of
11 other -- you know, of the bid in a way that really drives down
12 the value of OPCO. And as the Court knows, the excluded assets
13 were never valued by anyone at OPCO or any debtor. That
14 whatever this Alvarez report is, and whatever weight you give
15 it, Your Honor, it didn't exist on April 16th. It didn't exist
16 until after April 22nd when one of the Counsel asked Mr. Caruso
17 to prepare it. Time and time again Lazard said they never
18 valued it and all they told the board was, taken as a whole,
19 this looks good to us, okay. They didn't say -- they refused
20 to say they didn't say it under deposition and they didn't say
21 it to the board, that they thought that 35 was fair for these
22 assets. And I say 35 because the credit that's being given to
23 other bidders in the bidding procedures is 35, that's what they
24 get. That's what it says.

25 And at this point I'm going to defer to Mr. Winston

1 and then come back and deal with a couple of remaining issues,
2 Your Honor.

3 **MR. WINSTON:** Good afternoon again, Your Honor. Eric
4 Winston for the committee. In this portion of the committee's
5 presentation, I will address the so-called excluded assets and
6 I'm going to be mostly going off the list as it's contained in
7 Exhibit B-1 to the asset purchase agreement, which is the 26
8 categories of assets that will be conveyed.

9 **THE COURT:** That's what I referred to earlier.

10 **MR. WINSTON:** Yes. There's just been some different
11 uses of the phrase excluded assets. That's primarily what I'm
12 going on.

13 **THE COURT:** Thank you.

14 **MR. WINSTON:** And I'm going to divide the
15 presentation up into three parts. First, I'm going to address
16 several categories of excluded assets that, at least prior to
17 two days ago, were going to be conveyed to PROPCO and weren't
18 in any way valued by Alvarez. Second, I'm going to address
19 several categories that are in the APA, Exhibit B-1, that as
20 best we can tell are brand new. And third, I am going to
21 address the three categories of assets that were provided for
22 which there are indicative values by Alvarez. I had actually
23 had hoped I could junk all that when I was preparing my script,
24 but just to be safe, I thought I better cover it. And those
25 three, of course, are in information technology systems,

1 certain of the trademarks, and the Wild Wild West land parcels.

2 Now before I go into all of this, I do think it's
3 important to set the table why valuation of these excluded
4 assets is important. You've already alluded to this, Your
5 Honor, when you asked my colleague if there was more money on
6 the table, how would we feel about this would we still be
7 objecting? And there's -- there are other issues, but there's
8 no doubt that if there was more money on the table -- a lot
9 more money hopefully, but if there was more money on the table,
10 the concerns about the value of the excluded assets would be
11 probably ameliorated in significantry, if not completely
12 eliminated. And it's not just what happen --

13 **THE COURT:** And some of those other concerns would
14 not be as important as they are now.

15 **MR. WINSTON:** Probably -- and more importantly --

16 **THE COURT:** I understand how this works.

17 **MR. WINSTON:** Yeah, you sit down and you talk it
18 through. You don't send -- you don't spend four days worth of
19 court time. And it's not just what has been valued, but it's
20 the lack of value and how this Court is to apply the legal
21 standards under 363, to the extent it's applicable, and
22 Bankruptcy Rule 9019 and the Ninth Circuit's A&C test, when
23 considering whether this transaction maximizes the value to the
24 OPCO estate. And it is important to look at it from that
25 perspective because we're the objecting parties, we're -- our

1 constituencies, I think overwhelmingly creditors of the OPCO
2 estate, and we think it's not fair. So you need to make sure
3 when you're considering whether it's 363 or under 9019 --

4 **THE COURT:** I understand most of your constituency is
5 part of that 2.45 billion.

6 **MR. WINSTON:** I think that's probably right, yeah.
7 Certainly it's -- whenever I hear people -- if I just make an
8 aside -- that the vast majority of creditors of the OPCO estate
9 support that, that's just not remotely correct. It's -- a
10 majority of OPCO Lenders apparently support it, but not the
11 majority of creditors.

12 **THE COURT:** The secured lenders?

13 **MR. WINSTON:** Secured lenders.

14 **THE COURT:** That may be under secured, but who knows.

15 **MR. WINSTON:** Yeah. And, Your Honor, I think
16 correctly noted in connection with the Caruso declaration
17 evidentiary objection, that Your Honor is supposed to make an
18 informed and independent judgment as to whether this is above
19 or low the lowest point of reasonableness. Now the Supreme
20 Court, in TMT Trailer, did still instruct all bankruptcy courts
21 that there cannot be an informed and independent judgment --
22 and I'm quoting here --

23 "as to whether a compromise is fair and equitable
24 until the bankruptcy judge has apprised himself of
25 all facts necessary for an intelligent and objective

1 opinion of the probabilities of ultimate success
2 should the claim be litigated."

3 That's 390 US at 424. And there's a number of
4 courts, and I can you give citations, but I'll sum it up, that
5 have held that if you're not provided definite numbers, proof,
6 things that are not just merely guessed or mentioned or
7 assessed based upon the opinion of the debtors themselves or
8 the proponents to the settlement, it ain't good enough. That's
9 not what this Court needs in order to make its informed and
10 independent judgment.

11 So in that context, I want to turn first to what has
12 not been valued. And there's a lot of categories that haven't
13 been valued, but I'm going to focus only on five. And the five
14 ones I'm going to specifically focus in on are patents, other
15 intellectual property, business information, the primary
16 customer database and the non-competes. And I've picked these
17 for several reasons. One, they are in and of themselves assets
18 that are valuable to a casino business. Two, they happen to be
19 assets that probably work with most -- work most closely with
20 what has in fact been valued by Alvarez, in particular the IT
21 assets. So when we think about the IT assets, these five
22 categories become a lot more relevant.

23 Let me turn first to patents. The motions propose to
24 have Station Casinos Inc., OPCO, license to PROPCO any and all
25 patents and patent applications relating to player tracking

1 systems. Now according to what we have as Exhibit 1, which was
2 the April 19th schedule of excluded assets, Stations will
3 license, for no compensation, three specific patents and then
4 there's an unidentified list of additional patents and patent
5 applications. And this is the first flaw that your Court needs
6 to consider for purposes of the gaping hole in the record. We
7 don't even know what in fact is being assigned. We know the
8 three specific ones, and in fact, Exhibits 59 to 61 are those
9 specific patents and that's why I wanted to put them in, but we
10 also put in Exhibit 74. And this is a patent application that
11 Station Casinos filed on October 23rd, 2008, that when I read
12 it, and I'm not a patent expert at all, but when I read it, it
13 seems to relate to player tracking. So I would like to know --
14 and you should know -- is it included or isn't it? And if it
15 is included, why wasn't it listed? If it is included, what's
16 the value of it? How important is it to Station Casinos? We
17 don't know.

18 Now let me turn briefly to ownership issues with
19 respect to patents, because there has been some argument that,
20 with respect to the IT systems, there's an ownership dispute
21 and I will definitely get to that in a little bit, but let me
22 start with the patents themselves. It cannot be legitimately
23 disputed that Station Casinos Inc. owns all of the patents and
24 patent applications relating to player tracking. The exhibits
25 that I referred to are U.S. Patent Trademark Office documents,

1 they clearly indicate Station Casinos Inc. is the owner.
2 Further, Exhibit 63, which is the PROPCO schedule of assets and
3 liabilities, they didn't check the box when it says do you have
4 any patents or other intellectual property; it was checked no.
5 So that's why we put that in, to show that at least PROPCO
6 doesn't think it has any patents. So the record before this
7 Court, at least with respect to the patented player tracking
8 systems, whatever that scope is, PROPCO has no ownership issue
9 in its opinion.

10 Now they've also made a lot of noise in their papers
11 that patents -- oh, sorry that some of the assets were already
12 part of the first master lease compromise and it's just really
13 a continuation, maybe clarification, that's -- I've seen that
14 argument. Clearly doesn't apply to patents. In fact, I think
15 the PROPCO reply quite clearly states that the patents being
16 transferred or being licensed are brand new. This is a brand
17 new asset.

18 **THE COURT:** When you read the chart that's what it
19 says.

20 **MR. WINSTON:** That's what it says. So I at least,
21 again setting the table, patents and the value of that license
22 is brand new, whatever that value is.

23 Now since they have provided no valuation of the
24 patents themselves, what the debtors have argued is that the
25 patents are effectively valueless, because they're old, 12

1 years approximately, and because player tracking systems are
2 available off the shelf now. And the evidence they have
3 supplied is the declaration of Mr. Kreeger, as well as his
4 deposition testimony, that I will note that just about every
5 portion of his deposition testimony is on that redirect. These
6 arguments fall flat.

7 First, there is absolutely no evidence or argument to
8 demonstrate that as a patent agent, including patented player
9 tracking systems, such patent becomes automatically less
10 valuable. By contrast -- and this is why I put these in -- we
11 have supplied secondary authority, and this was demonstrative
12 Exhibit 68 and 69, larger studies have shown that as a patent
13 is cited by other patents it becomes more valuable. It's not a
14 function of age necessarily, because you know, you can file a
15 patent two weeks ago and it could be cited a 100 times, but
16 clearly if there's an older one and it's been cited a lot, that
17 suggest it's quite valuable, which is why I go back to Exhibit
18 62, which you've reserved ruling on, and I understand that.
19 But that document shows that these patents have been cited
20 quite often. In particular, Patent 6302793 has been cited by
21 subsequent patents 47 times. So under that secondary authority
22 that we've cited, that --

23 **THE COURT:** Does that exhibit show when those
24 citations happened?

25 **MR. WINSTON:** I believe the -- if -- let me get

1 Exhibit 62 out. I think it does show --

2 **THE COURT:** And I guess my next question would be,
3 without reading all the law review articles, can a patent be
4 cited for one particular component as opposed to other?

5 **MR. WINSTON:** Sure, it's certainly possible.

6 **THE COURT:** So, I find that very difficult, unless I
7 know exactly why the person was citing it, what the purpose is
8 and how to ascribe any increase or decrease of value based upon
9 the number of citations, unless I know why.

10 **MR. WINSTON:** Your Honor, that's completely fair
11 point.

12 **THE COURT:** Does that make sense?

13 **MR. WINSTON:** It does make sense, absolutely. Let me
14 first respond to your question about does it show the dates.
15 The document does not show the dates. It shows the patent
16 numbers. I'm going to guess, and these are links, if you click
17 on it, it will show the date, but we don't --

18 **THE COURT:** I don't have that time.

19 **MR. WINSTON:** You don't have that time, I understand.
20 I mean, there's 47 of them, so there's quite a few of them to
21 go through, but you know, it doesn't show the date. To answer
22 the question of --

23 **THE COURT:** And it can't tell me why?

24 **MR. WINSTON:** Well, if you go in and click on them it
25 will tell you why, but that's -- I understand. The point we

1 were making is Your Honor has no evidence of what the value of
2 this is.

3 **THE COURT:** Correct.

4 **MR. WINSTON:** Instead, because there's no value, what
5 the debtors have argued is well, they're just old and there's
6 other systems available.

7 **THE COURT:** What Mr. Kreeger said in his deposition
8 was -- especially as I saw it, and I can get to the page
9 citations, that the player tracking system, which was developed
10 in-house, as I believe, by Stations and apparently concerned
11 that it remain proprietary so others wouldn't have the same
12 benefit of that system, has aged to a degree, and those patents
13 have aged, that for the purpose -- he said, of Stations that
14 would have little or no value. That's, I think, exactly what
15 he said, and what I didn't -- what I wasn't sure because I
16 think there was a reference to CMS?

17 **MR. PARRY:** Casino Management System.

18 **THE COURT:** That's another tracking -- is that the
19 tracking system?

20 **MR. PARRY:** Different. There's -- it's within a
21 casino.

22 **THE COURT:** That's what I thought, okay. My point
23 being is that I -- if I read the -- I did not see in the
24 deposition that Stations was going to discontinue using it.

25 **MR. WINSTON:** Oh, I don't think Stations will

1 discontinue using it.

2 **THE COURT:** And I don't think that OPCO continues to
3 discontinue, or else why would it be transferred?

4 **MR. WINSTON:** I completely agree with that.

5 **THE COURT:** So that makes it seem to me if you're
6 going to still use something, it probably has some value.

7 **MR. WINSTON:** Oh, I --

8 **THE COURT:** So that's why I was wondering --

9 **MR. WINSTON:** There's clearly some value. In fact, I
10 was going to skip this over, but when there's an infringement,
11 which hasn't obviously occurred here because it hasn't been
12 handed off to PROPCO -- I mean, if Your Honor were to deny this
13 and Fertitta Gaming took it over, maybe there will be an
14 infringement case, but in the infringement context there's a
15 very famous case called Georgia Pacific from 1970, 15 factor
16 test that's been cited, I don't know, 100 times, Federal
17 Circuit has adopted it. And the 15 factor test is designed to
18 figure out what's the reasonable royalty rate for the
19 infringement. That would be the proper analysis that someone
20 should go through to figure out what the value is to PROPCO to
21 license it from Stations.

22 **THE COURT:** Why -- let me ask you this question
23 because running throughout your objection is the value to
24 PROPCO. Is the value to PROPCO the same as the value to OPCO?

25 **MR. WINSTON:** Not necessarily.

1 **THE COURT:** I would agree with that. So why -- how
2 do you expect there to be an extrapolation? Because the one
3 point was made, it was either in your pleadings or it may have
4 been in Mr. Goldberg's, that look, it's going to cost 20, maybe
5 40 million for PROPCO to replace its computer systems, hardware
6 and software, and then there's costs associated with the people
7 involved, and therefore that's the value to OPCO? I -- to me,
8 that's a syllogism that doesn't work, maybe you or Mr. Goldberg
9 can explain it to me. I think it was in Mr. Goldberg's papers,
10 I could --

11 **MR. GOLDBERG:** Yes, it was.

12 **THE COURT:** -- but really, the argument in your
13 papers are the same. This is what the value is to PROPCO, this
14 is of the value to PROPCO. Okay, fine, and that makes sense to
15 me because you've had these entities that have been operating,
16 in a sense, in a consolidated sense with their IT and other
17 matters, their trade names or patents, they've all been sharing
18 ownership. There's no doubt, I think you're right. I see
19 nothing in the evidence that would indicate to me that the
20 patents are owned by anyone other than OPCO. They may be
21 subject to security interests and we'll talk -- and the claims,
22 and we'll talk about -- I guess I'll hear about that, but the
23 ownership interest, I think, is beyond dispute.

24 But my point being, if PROPCO -- or New PROPCO does
25 not have the ability to utilize what had previously been

1 shared, what is the value? Then the -- I guess -- then I
2 thought, well, if the new bidder -- because the bidder is the
3 bidder for the OPCO assets, not PROPCO. And if it doesn't have
4 any use for them, the only value, I guess, is what can I compel
5 PROPCO to pay me for them. That's not a willing buyer and
6 willing seller, necessarily. I don't know if that really
7 indicates fair market value in the classic test that we're all
8 familiar with. And I think -- that's what I'm wrestling with.
9 Do you understand my concern?

10 **MR. WINSTON:** I do and I'm going to address it in a
11 number of responses because I --

12 **THE COURT:** Okay. Good. Just so you know what I'm
13 looking at.

14 **MR. WINSTON:** I got the insert --

15 **THE COURT:** I understand -- I really do understand
16 the value of these to PROPCO. I don't need any -- really, I
17 mean, I think that's a matter within my perception. My ability
18 to arrive and draw those inferences. I've been using the name
19 Bolish Boulder (phonetic), it has some value, if I've been
20 using a player tracking system and now I don't have to replace
21 it, it has value. If I've been using certain customer lists,
22 it has value. I mean, and I need to get that transitioned so I
23 can stand alone. I understand all that. Or if I don't have to
24 stand alone and actually can have them transferred to me and
25 the person or the entity who is transferring them to me has no

1 use for them, and that assists a debtor in its reorganization
2 here, because PROPCO is also a debtor in its own reorganization
3 in a sense, that -- all that does is establish value for
4 PROPCO. I'm not sure it establishes value for OPCO. And
5 that's -- I'll let you address it, but that's what I've been
6 trying to work through.

7 **MR. WINSTON:** Sure. Okay. There's -- I'm going to
8 approach this from a variety of angles here. What you've been
9 asked to approve is a transaction by which PROPCO gets this.
10 So --

11 **THE COURT:** If it wants it.

12 **MR. WINSTON:** If it --

13 **THE COURT:** That's their optionality argument.

14 **MR. WINSTON:** That's what the optionality is. But
15 let's assume that if they actually decided that they actually
16 want to operate casinos and they don't want to have --

17 **THE COURT:** I'm going to assume they're going to
18 exercise their option and --

19 **MR. WINSTON:** And take it. And maybe they'll
20 exercise their option of not buying the off-the-shelf systems
21 that are supposedly so much better and they'll just take the
22 ones that, you know, Stations has already been license -- or
23 has been using for years.

24 All right. From a perspective of what is the range
25 of reasonableness for what should be paid for these assets, the

1 whole basket, which patents licensing is one of them, you need
2 to figure out what is the fair market value of the license.
3 And the license goes in two ways. It goes from the perspective
4 of the licensor and the perspective of the licensee. In fact,
5 when I mentioned the *Georgia Pacific* factors, those are
6 specific factors. What's the value -- what's the special value
7 to the licensee, what is in the historical and projected use to
8 the licensor. So you do look at it from both angles, and the
9 last factor in the *Georgia Pacific* test is, assume a
10 hypothetical negotiation of the licensor and licensee, what
11 would they come up as the reasonable royalty rate?

12 That's the negotiations because here Station Casinos
13 is presumably going to continue to use its own player tracking
14 systems. I don't -- you know, I guess it's possible if someone
15 is -- if Boyd comes in or Harrah's comes in or somebody else
16 comes in, they may want to implement their own, I don't know,
17 but part of the arguments I'm going to point out to Your Honor
18 in just a second is, supposedly Station's is much better than
19 everybody else's, but there is a value to the acquisition of
20 the asset itself from the OPCO perspective to make sure its
21 competitor doesn't have the same system it is using. And
22 that's -- when you ask the question, do you understand the
23 value from PROPCO's perspective, now you're partially
24 understanding the asset valuation concern from OPCO's
25 perspective.

1 Now let me give you a hypothetical, because if we
2 were at the disclosure statement hearing or the confirmation
3 hearing, we would do exactly this. Suppose we were in a
4 hypothetical liquidation, the casinos shut down. You still own
5 the patents and you have the ability to sell that patent and
6 there's all sorts of entities out there, I've been learning
7 this since I've been at my -- the firm I'm with because they do
8 this, there's all sorts of firms out there that go around
9 buying patent portfolios. Why? For two reasons, because they
10 can find people they can license it to and then they can go sue
11 lots of people to -- you know, for anyone that's infringing.
12 There's value in and of that that's being ignored here. Your
13 question is a great one and I can't give you the precise answer
14 of what's OPCO's valuation perspective and PROPCO's because no
15 one has. I'm just pointing out the facts.

16 And just to kind of build the point, I do want to go
17 back to the issue of how good are these systems based on what
18 Station thinks, okay, what Station thinks. And I realize
19 Exhibit 70, which was the newspaper article that you clearly
20 signaled not a lot of weight to, so I'm not going to, you know,
21 I'm not going to go over that one, but I do want to go to
22 Exhibit 72. And this is the 10(k) from Stations, and that one
23 they're talking about their boarding pass program and their
24 ability to market through existing and potential customers.
25 And they actually -- there's a quote that we have -- that we

1 want to point out is, "We believe that these products creates
2 sustainable, competitive advantages and distinguish us from our
3 competition." The boarding pass program, the ability to market
4 to existing and potential customers flows from player tracking.

5 Now, I go back to my newspaper article, which little
6 weight, but the point of it is, the statement in there was, you
7 slip that card into the machine, it tells you a lot about that
8 customer. That's why it's so valuable. Similarly, Exhibit 40,
9 which is the note that --

10 **THE COURT:** I don't think I needed a newspaper
11 article to --

12 **MR. WINSTON:** Yeah, I know, but that's -- these
13 aren't my words.

14 **THE COURT:** Yeah, I understand.

15 **MR. WINSTON:** It's the newspaper saying it's
16 Stations' words. And that's the point, is they know these
17 things are valuable.

18 Now let me go to Exhibit 40. This is the one we
19 fought about a little bit in terms of evidentiary objections --

20 **THE COURT:** Forty?

21 **MR. WINSTON:** Forty. This is the note that A&M
22 prepared in its conversation with Mr. Kreeger sometime in
23 February 2010. There is a provision in that exhibit or one of
24 the summaries is -- what I think occurred is the question was
25 asked of Mr. Kreeger, why is Stations better? And the response

1 was, because it tracks players on 170 different segments of
2 data, whereas other player tracking systems track three to four
3 segments of data. That's a reason -- not the only one that was
4 said in the notes, but a reason why Stations does better. The
5 timing of that conversation is important. It was not timed to
6 coincide with this litigation. It wasn't a declaration to
7 support a deal that values patents at virtually nothing. It
8 wasn't in connection with a deposition where we've been
9 criticizing the statement that the value of the patents is
10 zero. Instead, it was done at a time when Mr. Qusba's clients
11 hadn't signed onto a deal and therefore had every incentive to
12 try to maximize the value of the excluded assets that would be
13 conveyed to Fertitta Gaming, if they're going to get conveyed
14 at all.

15 **THE COURT:** One moment, please.

16 **MR. PARRY:** Your Honor, this was precisely the nature
17 of my evidentiary objection. If you read the document, it
18 indicates Station tracks 170 characteristics, somebody else
19 does three or four. It's not that the software allows Station
20 -- Station software look deeper, it's that Station's management
21 pays attention to more parameters, okay. They could have asked
22 Mr. Kreeger about this document in his deposition, they didn't.
23 They introduced this document two days before, so they were
24 aware of the document, they knew about it. Mr. Kreeger gave
25 testimony precisely on this point. They didn't try to impeach

1 him with the document. The document is hearsay when used in
2 the manner that Mr. Winston is trying to use it.

3 **THE COURT:** I think it is. I think you're offering
4 it for the truth -- you're saying it's an admission?

5 **MR. WINSTON:** Yeah, Your Honor, that -- we argued
6 about that. It's a party opponent admission, so --

7 **THE COURT:** I -- I under -- I thought I ruled on
8 this --

9 **MR. PARRY:** It's an A&M document, it's not my
10 admission.

11 **THE COURT:** I thought I ruled -- now, it's -- the
12 statement made to the A&M, I guess it was to Mr. Caruso or
13 maybe it was McDonough.

14 **MR. WINSTON:** We think it's Mr. McDonough.

15 **MR. PARRY:** Well, it's not quoted.

16 **THE COURT:** So it's a hearsay on hearsay issue.

17 **MR. PARRY:** Yeah, it's not quoted, it's just sort of
18 a bullet point summary of what --

19 **THE COURT:** I don't know what Mr. Kreeger said. I
20 know what Mr. McDonough wrote that he said Mr. Kreeger said and
21 Mr. McDonough hasn't been deposed, Mr. Kreeger has been
22 deposed. I am going to rely to a great extent on Mr. Kreeger's
23 sworn testimony.

24 **MR. PARRY:** Thank you, Your Honor.

25 **THE COURT:** And I -- I'm aware the document was

1 available and I'm aware that there was no attempt to ask
2 Mr. Kreeger about it, which candidly tends to reduce the weight
3 that I place on it because it doesn't give the witness a chance
4 to explain it, if he said it and what he meant by what he said
5 it. Now, I've already ruled, now I've even amplified how I
6 intend to utilize it. I'm more concerned what people say under
7 oath out of their own mouth.

8 **MR. WINSTON:** I understand, Your Honor.

9 **THE COURT:** Fair enough. Let's go.

10 **MR. WINSTON:** I understand. All right, so let's --
11 I'm going to finish this section of my presentation with a
12 statement from Mr. Kreeger during his deposition. This is at
13 Page 106, Lines 9 through, I think it's 18, where he was asked
14 the question --

15 **THE COURT:** Is this Kreeger?

16 **MR. WINSTON:** Yeah.

17 **THE COURT:** One moment. What page?

18 **MR. WINSTON:** Page 106, 9 to 18, I think.

19 **THE COURT:** I'm there, go ahead.

20 **MR. WINSTON:** I want to make sure I got the page
21 right.

22 **THE COURT:** I've got it marked up somewhere else.
23 I've got about four copies of all these depositions. Go ahead.

24 **MR. WINSTON:** Completely understand. Now you just
25 heard Mr. Parry say that there was some talk about software and

1 I fully understand that. He was asked, "How about in 2009, do
2 you know the amount that Stations paid to customize its
3 software?" "Answer: A specific software or all our software?"
4 "Question: All your software." "A: I don't know the exact
5 number, but I could take a swag at it. You know, it's probably
6 somewhere in the tune of half-a-million dollars to a million
7 dollars." "And you think the number would be roughly the same
8 for 2008?" "Yeah, I would imagine so."

9 Why do I bring this up? If Station Casinos
10 believed --

11 **THE COURT:** Oh, it indicated -- when I read that, and
12 I did read it before, that's an annual cost that the debtor
13 spends to make sure that its software stays up to speed,
14 doesn't become obsolete.

15 **MR. WINSTON:** Fair enough.

16 **THE COURT:** That's what I read that for.

17 **MR. WINSTON:** I guess, here's my point of this. If
18 the off-the-shelf systems were function -- on a functionality
19 basis were better, why would Stations ever spend any money on
20 it, why not just buy the new software? There would be a little
21 downtime, I get that. I get that, but when you take this
22 entire package of statements, and in the face of complete lack
23 of any valuation testimony, this Court has to conclude there's
24 a gaping hole in the record as to the value of this particular
25 asset.

1 All right. Let me move on. Primary customer
2 database. Again, I don't think it can be legitimately disputed
3 that customer databases are valuable to casinos, including
4 Station Casinos Inc. Mr. Genereau stated at his deposition
5 that the customer lists are to be part of the crown jewels of a
6 casino operation. The debtors and the lenders -- and we put
7 this into evidence for a reason, certainly talked about in our
8 papers. The debtors and the lenders don't deal with the fact
9 that we were able to find in one of their 10(k)'s the situation
10 where Station Casinos bought another casino, it was the Fiesta
11 Rancho, I believe. And that's not one of their larger
12 properties -- it's not the smallest one, but it's not one of
13 their larger ones. In the connection with that sale in 2001,
14 the customer list of that casino was valued at \$5 million and
15 then it was depreciated over time.

16 The debtors and the lenders also ignore that the
17 customer database is itself a direct result of the time and
18 money spent on player tracking systems. That's how you build
19 up your customer database, you convince them to get a card,
20 that card reads them, it starts to figure out what they like
21 and what they don't like and that's how they become part of
22 that customer database. I believe that Stations has spent lots
23 of money to build up its customer database for all of its
24 properties and it owns those -- it owns those.

25 Now under the current deal, PROPCO gets access to the

1 customer database, because -- and when I say the current deal,
2 the first master lease compromise, and that is true, but there
3 is a massive change that has occurred if this deal is approved
4 and that deal is this. They get the exclusive right to the
5 information of its top 25 percent of the primary customers that
6 have played at the four casinos. Station Casinos will have to
7 delete any reference to those top 25 percent primary customers.
8 In other words, after investing substantial costs building up a
9 customer database over years, I mean three of the casinos are -
10 - have been around a long time, Station Casinos will in fact
11 have to surrender that information database sometime in the
12 near future. If -- now, if Fertitta Gaming continues to own
13 it, it's sort of a wash, I mean, you know, who cares, but if
14 somebody else were to come and try to bid for that, including
15 the casinos that the debtors have pointed out compete with
16 those four casinos, they've just lost the ability to access a
17 potentially valuable data source. And I'm not kidding when I
18 say casinos care about this stuff, just in 2008 Harrah's sued
19 Station Casinos over a customer list, you know, alleged theft
20 for the Thunder Valley Casino in Sacramento, California -- or
21 outside of Sacramento. Casinos really care about this stuff
22 and you're -- and by depriving the purchaser of the OPCO assets
23 the ability to get these names, you're depriving them of a
24 potentially valuable source for which there is no value before
25 this Court.

1 **THE COURT:** And are you saying that the use of the
2 top 25 percent of the customer base for the four casinos that
3 are to be spun off would continue to have value for OPCO after
4 the sale or what -- to New PROPCO?

5 **MR. WINSTON:** Assuming it's not Fertitta Gaming that
6 bids for it?

7 **THE COURT:** Well, let -- Fertitta Gaming also --

8 **MR. WINSTON:** Obviously it's a wash, right? Because
9 they own everything, it doesn't matter.

10 **THE COURT:** Right. That's right. What you're
11 telling me is, if I were interested in bidding on OPCO, that
12 even though I was not going to purchase the four casinos that
13 are intended to go to New PROPCO, that the top 25 percent of
14 the customer database for those casinos would be important to
15 me at OPCO?

16 **MR. WINSTON:** Certainly could be.

17 **THE COURT:** Yes to block PROPCO from access for
18 actually providing me with some affirmative benefit?

19 **MR. WINSTON:** I could see both situations.

20 **THE COURT:** Do you understand my question?

21 **MR. WINSTON:** Of course. Of course. And I see both
22 situations. Let me -- again, it has been argued that Boyd has
23 casinos located close by to the PROPCO casinos.

24 **THE COURT:** And, in fact, deposition testimony is
25 that was one of the concerns about Boyd, that Boyd could get a

1 lot of this proprietary information, withdraw from the deal,
2 and then would have all the --

3 **MR. WINSTON:** And by the way, that feeds into my
4 exact point about why customer databases are really important.

5 **THE COURT:** Oh, I don't think you have to convince
6 anybody in this room of that.

7 **MR. WINSTON:** Well, it would be nice to have a
8 valuation, because that's the problem; we don't know.

9 **THE COURT:** But I'm trying to figure out, what is the
10 value to OPCO --

11 **MR. WINSTON:** All right. So --

12 **THE COURT:** -- once the casinos are no longer owned
13 by OPCO.

14 **MR. WINSTON:** Let's give the Boyd example. Let's say
15 Boyd, in our hypothetical world, decides to bid for the OPCO
16 assets and wins. If Boyd has other casinos within its empire
17 that compete with the four casinos, you think they're going to
18 want to know about the asset they just bought, about that
19 customer database? And do you think they will bid more or less
20 if they know that part of that database has the top 25 percent
21 at this four casinos that compete with its casinos?

22 **THE COURT:** So what you're really telling me is that
23 -- not just Boyd, but if anybody had the ability to retain that
24 information, deprive New PROPCO of that information, they would
25 have a significant competitive edge that's now being

1 surrendered?

2 **MR. WINSTON:** Certainly could be.

3 **THE COURT:** Is that what your position is?

4 **MR. WINSTON:** Essentially, yes. And the best test
5 for this, put it up for auction and see if I'm wrong. I do
6 want to make one last point about customer databases.

7 **THE COURT:** Well, I guess --

8 **MR. WINSTON:** Yeah.

9 **THE COURT:** -- that gets me back to my point; the
10 auction process itself. And what you're saying is that the
11 auction process itself would not -- there is no market for the
12 excluded assets. There's no second market test, just as there
13 is a second market test for the non-excluded assets.

14 **MR. WINSTON:** That is correct, Your Honor.

15 **THE COURT:** I got you.

16 **MR. WINSTON:** All right. I do want to make one last
17 point about customer databases; this is very specific to the
18 committee. If there have been customers since the petition
19 date that have been added to the customer database, including
20 for those four casinos, we would submit since Station Casinos
21 Inc. owns the database, that those are assets that are not
22 encumbered by any lien under 552. So when those are being
23 given away -- and I have no idea what that valuation is,
24 because guess what, no one has done it yet, including us. This
25 may become a plan confirmation issue if we're going down that

1 road, but from my perspective, anytime a customer is a post-
2 petition, including within those four casinos, that's an asset
3 -- an unencumbered asset that's being deprived for my
4 constituents.

5 **THE COURT:** Not proceeds, et cetera --

6 **MR. WINSTON:** I don't think so.

7 **THE COURT:** -- so excluded by 552?

8 **MR. WINSTON:** Excluded by 552.

9 All right. Next category, this is the other
10 intellectual property, and I'm also going to combine it with
11 business information. This should actually go pretty quickly
12 because my point for both of these is, no one has any clue what
13 actually is being transferred here and that's dangerous for
14 purposes of establishing what other people are going to be
15 bidding on and what value is being given away.

16 When I looked at the definition of other intellectual
17 property, there are certainly some examples that have been
18 given in it, but it's very broadly defined. I even asked
19 PROPCO's independent director, Mr. Kors, at his deposition
20 whether he knew what was on that list and his answer was, "I
21 have no idea."

22 Now PROPCO, in its reply, has contended that the only
23 difference between the original deal and the proposed new deal
24 is that in addition to mutually agreed upon value and form of
25 consideration being finalized, there's going to be a non-

1 exclusive perpetual paid up license provided to PROPCO for this
2 other intellectual property, but that's actually not the other
3 change and there's a pretty significant change that hasn't been
4 highlighted. The new deal includes proprietary software --
5 this is at the revised compromise, go back to Annex 1, Section
6 7, whereas the original deal only included non-proprietary
7 operating software and software necessary to access and use the
8 SCI lease collateral and the operating subsidiaries lease
9 collateral. Now I don't actually know what is meant by
10 proprietary software. I don't know if it's the player tracking
11 stuff, I don't know if it's additional customized software, and
12 there are examples for that, but the problem is again, we have
13 a gaping hole in the record.

14 Same thing goes with business information. The
15 original deal they were entitled to certain business
16 information and it was non-competitive, non-confidential and --
17 business information and it had to be used exclusively at one
18 of the four casinos. That's changed. Now they can get a lot
19 of competitive and confidential and not necessarily exclusively
20 used only in those four casinos business information. I have
21 no idea what's the extent of it, I have no idea what's the
22 value of it. Again, a gaping hole in the record.

23 Last -- in terms of the assets that haven't been
24 valued, I want to talk about the non-competes. If this deal is
25 approved, Stations will be compelled to waive covenants not to

1 compete so that PROPCO for a period of time can pitch for key
2 corporate level employees. Why do I care about this? I am not
3 interested at all in preventing someone who wants to go work
4 for PROPCO from having the opportunity to go work for PROPCO if
5 that's what he or she wants to do.

6 **THE COURT:** And Mr. Genereau testified that they
7 considered this by the folks who were loyal, that they didn't
8 see any reason to block them. I think the word "blocker" was
9 used.

10 **MR. WINSTON:** That was pretty much the -- you hit the
11 nail on the head. It is interesting that -- I think his exact
12 words were loyal to Frank or Fertitta Gaming. I find it sort
13 of surprising that anyone could be loyal to Fertitta Gaming
14 right now, but that's just me maybe in my paranoid world. I
15 don't understand how it's possible.

16 **THE COURT:** No, if you read that whole deposition
17 there was the use of FG and Fertitta, and just like everybody
18 else in this case there's been a lot of --

19 **MR. WINSTON:** Lot of loose language.

20 **THE COURT:** -- lot of usage of terms. That didn't
21 bother me at all, but I read exactly what he said.

22 **MR. WINSTON:** Sure. And this is a big change because
23 before they could only go after certain employees at the four
24 casinos.

25 **THE COURT:** And your points were that, especially in

1 the area of technology, that this could cause significant harm
2 to OPCO?

3 **MR. WINSTON:** That was actually Mr. Goldberg's point
4 in his papers, that 30 percent of the IT department at Station
5 Casinos Inc. is subject to non-competes. And one of the things
6 that was in the Alvarez report was it's what's in the heads of
7 these people that is in many way the most valuable aspect of
8 the IT systems, because they know how to actually operate and
9 improve upon it.

10 What ought to have happened here, if this Court is
11 even interested in letting --

12 **THE COURT:** Are you saying that OPCO then should
13 enforce the non-compete.

14 **MR. WINSTON:** Well, this is what ought to have happen
15 -- ought to happen if this Court is going to even go down this
16 road. Whoever buys OPCO should be able to have the first dibs
17 at all the employees that are subject to non-competes. If they
18 don't want them, if they just don't want to hire them, then
19 they should waive them.

20 **THE COURT:** In other words, enforce it.

21 **MR. WINSTON:** Well, no the difference is -- the
22 difference is, anyone who is buying the OPCO assets, and this
23 is actually provided for in the APA, is supposed to get a
24 business. That business includes the people that can operate
25 it. If the minute somebody walks in the door, the most

1 valuable employees all have left, after they've bid for this
2 asset, that's unfair to that purchaser, indeed that's going to
3 chill bidding. They should have first dibs. What I don't want
4 to see happen, and this would be the unfairness, is they don't
5 want to hire somebody, and then they say, but you can't go to
6 PROPCO. That would be the unfairness, because now you're
7 depriving an individual of an opportunity to have a living for
8 reasons that there's no rational basis, other than to be sort
9 of -- extracting improper leverage against PROPCO.

10 **THE COURT:** You're saying, they're going to let them
11 -- repeat that. I'm not sure I understand your argument.

12 **MR. WINSTON:** Okay. So what should happen is whoever
13 is the OPCO purchaser comes in and says all right, the 100 guys
14 that have non-competes, I'm offering you employment on these
15 terms and conditions, do you want it or not? And for the ones
16 that say yes, there's no -- then the non-compete is still
17 there, PROPCO can't go after them. But for the ones where they
18 say no, then you let them go to PROPCO if PROPCO wants to hire
19 them. That's what they're buying.

20 **THE COURT:** All right. I understand.

21 **MR. WINSTON:** Or if -- and the thing is, going back
22 to my full point of lack of valuation, covenants of non-compete
23 are valuable assets. You spend a lot of money training
24 somebody, you expose them to their -- to your business secrets,
25 you don't want some competitor come by and steal them away. So

1 there has to be some way to make sure an OPCO purchaser, other
2 than Fertitta Gaming, isn't left in the cold.

3 **THE COURT:** Well, that's the key, it has to be some
4 third-party.

5 **MR. WINSTON:** Of course. Now again, I only go to my
6 situation where I'm assuming Fertitta Gaming isn't it, because
7 it kind of washes itself out, but I do want to go to this
8 hypothetical. Suppose it wasn't Fertitta Gaming that wasn't
9 the buyer of PROPCO, but somebody else, Boyd, Wynn, MGM or
10 Harrah's, somebody like that.

11 **THE COURT:** The buyer of?

12 **MR. WINSTON:** PROPCO. And wanted to cut the same
13 exact deal. Do you think there's a chance that there would be
14 a waiver of the non-competes without any consideration?
15 Absolutely not. We all know that.

16 All right. Now let me talk -- turn to the new assets
17 that I think have been added to the APA. This is in Exhibit B-
18 1 to the APA, there's a couple of categories --

19 **THE COURT:** I'm right there.

20 **MR. WINSTON:** -- that I think are new. First, let me
21 go to Category 14, and this is says -- let me quote it just to
22 make sure I get it right. That the -- the lead in is all the
23 right title and interest to the sellers, that all rights,
24 claims, rebates, discounts and credits, including all
25 indemnities, warranties and similar rights, security and other

1 deposits, excluding bank deposits, refunds, causes of action,
2 rights of recovery, rights of setoff, rights of recruitment,
3 other than tax refunds, and rights to insurance proceeds, to
4 the extent relating to the PROPCO properties or the Wild Wild
5 West assemblage, that category is to be transferred to PROPCO.
6 That's how I understand this works. I'm -- I doubt this is
7 what the parties intended, but I have to ask because this is
8 the type of thing that ends up before the U.S. Supreme Court.
9 The phrase, "To the extent relating to the PROPCO properties
10 and the Wild Wild West assemblage" if you apply the last
11 antecedent rule, applies only to insurance proceeds. And then
12 taken literally, every cause of action of Station Casinos Inc.
13 would get transferred. I doubt that's what they intended, but
14 I think there needs to be a clarification that that's the case.
15 If I'm wrong about that, then somebody needs to value every
16 cause of action that Station Casinos Inc. would otherwise be
17 providing.

18 Okay. Now turning --

19 **THE COURT:** I think you've picked up on the
20 draftsmanship.

21 **MR. WINSTON:** Maybe so, but I wasn't kidding when I
22 said this goes to the Supreme Court.

23 **THE COURT:** Oh, I understand that.

24 **MR. WINSTON:** And that may be what they intended; I
25 don't know. I mean, the --

1 **THE COURT:** We'll hear.

2 **MR. WINSTON:** Yeah. My estate claims are getting
3 release under the plan -- this is a great way to make sure they
4 get released, so I don't -- you know, who knows.

5 Now let's go to Category 17. Category 17 is all
6 supplies owned by sellers and allocated to the PROPCO
7 properties or the Wild Wild West assemblage. Now this one,
8 best I can tell, is also new. And I don't know what is meant
9 by supplies. If we're talking paper napkins and things like
10 that, it's probably not worth the time and energy to fight
11 about.

12 **THE COURT:** That's what I assumed it to be.

13 **MR. WINSTON:** I assume it's the case, but it is a new
14 ask, so we wanted to make sure that we understand what it is
15 because it also does lead me back to Category 11. Category 11
16 is actually in what was filed on April 19th.

17 **THE COURT:** Which is inventory and tangible personal
18 property. Wouldn't that include supplies?

19 **MR. WINSTON:** I would think so, which is --

20 **THE COURT:** That's -- I asked the same question.

21 **MR. WINSTON:** That's why -- you know, this is -- it
22 could be again just draftsmanship.

23 **THE COURT:** I agree.

24 **MR. WINSTON:** But there is an interesting thing about
25 this category. This category says that inventory located or

1 dedicated to the PROPCO properties or the Wild Wild West
2 assemblage is to be transferred. Now I will carve out for a
3 second inventory that is located at those -- at the four
4 casinos, because putting everything else aside, there is a lien
5 that has been asserted against those, but there clearly hasn't
6 been a lien asserted against the Wild Wild West, and if you
7 look at the UCC1 that PROPCO filed, it only applies to
8 inventory at the location of the PROPCO facilities. So that if
9 it's dedicated to, but not located on, they're getting
10 something new. And my point is, I'd like to know what the
11 value of that is and we don't know.

12 All right. Getting there. Let me go to the last
13 sort of global category. This was what Alvarez did, in fact,
14 provide indicative values to. Let me first go to IT Systems,
15 and this will be relatively short. Alvarez did provide this
16 Court in its report two scenarios. I mean, there was actually
17 three scenarios, but I'm going to focus on two because that was
18 the focus of the papers.

19 One scenario is the so-called OPCO Standup Scenario.
20 And the range of value for that is between \$16 and \$20 million
21 dollars. The theory behind that scenario is, OPCO needs to get
22 it's Texas server up to speed, needs a redundant one somewhere
23 else and in effect, PROPCO would be reimbursing them for that
24 cost out of \$35 million. The second scenario, which is the one
25 that had been advocated by the OPCO Lenders up until the time

1 they cut their deal, is the PROPCO replacement scenario. And
2 this is the one that looks at what it would cost PROPCO to
3 replace the systems at Red Rock and at Sunset Station, and the
4 range there is between \$40 and \$55 million.

5 So which one is the best indicator of fair market
6 value of the IT systems? I think the answer is clearly the
7 PROPCO replacement scenario. And the reason why is that not
8 only does it reflect what is the value to PROPCO, which is the
9 buyer, but it maximizes the value to OPCO. And the most
10 glaring flaw with the OPCO Standup Scenario is that it is
11 internally inconsistent. It is a variable valuation. Consider
12 this hypothetical, if today the Texas server was completely up
13 to speed and Stations had somewhere else a replacement server,
14 according to the OPCO Standup Scenario, the value to be
15 transferred to PROPCO is zero. That makes no sense. They're
16 buying something, it has to have some value, but in the OPCO
17 Standup Scenario, it would be zero.

18 So what's the default? The default is, what would it
19 cost PROPCO to go out into the market and buy what is already
20 there? And they estimated it at between \$40 and \$55 million.
21 Sitting here today, I can't quibble with it. I don't know
22 enough to quibble with it, so we're sort of accepting it, but
23 that isn't what was the basis by which Stations has entered
24 into the deal. So they've gone into the deal using a valuation
25 that makes no sense.

1 Let me turn to ownership disputes, because this has
2 been something that was of heated discussion in the papers,
3 particularly by the PROPCO entity. We said in our papers the
4 ownership disputes were phony. Here's why when it comes to the
5 IT systems. The master lease compromise executed in November
6 2007 does -- as PROPCO correctly states, does provide for the
7 transfer of fixtures to PROPCO, but IT systems are not fixtures
8 and PROPCO has not offered any evidence that they are.

9 First, and this would be painful to go through, but
10 if you look through Exhibit 63, the PROPCO schedules, you will
11 see there are no assets listed in those schedules that
12 constitute the IT systems. Then go look at Exhibit 66, this is
13 why we put this in, this is the Milbank opinion letter rendered
14 in connection with the 2007 LBO. This is -- and this opinion
15 letter is the one that indicated that the purported sale of
16 land and buildings to PROPCO was not a sale of substantially
17 all of the assets of Station Casinos. At Page 21 of that
18 opinion letter, Milbank stated,

19 "The sale and leaseback transaction does not include
20 a transfer of intellectual property (e.g. trademarks
21 or proprietary software and systems) or certain
22 personal property (e.g. furniture)."

23 That's the end of the quote. The use of the word
24 "systems" in that opinion letter is consistent with the use of
25 the word systems in virtually every pleading in this case in

1 connection with this dispute. Opposing parties refer to the IT
2 systems as systems. OPCO Lenders refer to them as systems at
3 Page 13 of their reply. And just to sort of buttress the
4 point, if this was truly an issue of ownership dispute, one
5 would have thought you would have seen a lot of evidence of it
6 long before April 7th. There would have been letters and
7 emails going back between Gibson Dunn and maybe Milbank,
8 depending what hat they're wearing that day, maybe Simpson, not
9 entirely sure, but you would have seen something. There wasn't
10 any that was produced. There's been none put into evidence.
11 You would have seen emails, at least between the principals,
12 saying we're aware of an ownership dispute. Some sort of
13 documentation, we're aware of an ownership dispute, but I ask
14 Mr. Kors, the PROPCO Independent Director, at his deposition,
15 whether he could remember any ownership disputes before April
16 7th and he says he could not recall. So when we wrote that the
17 ownership dispute, with respect to the IT systems, was phony,
18 we meant it.

19 Trademarks. Here Alvarez determined that the
20 indicative value of the trademarks category was between \$16
21 million and change and \$40 million and change. Now if
22 approved, just so that we know what's happening, Station
23 Casinos will absolutely assigned to NewCo, or PROPCO, 3
24 federally registered trademarks, 34 federal trademark
25 applications and then several dozen Nevada state trademarks.

1 Of these trademarks, Alvarez assigned value only to four
2 portions of the trademarks. The Boulder portion of Boulder
3 Station, the Sunset portion of Sunset Station, the Palace
4 portion of Palace Station and then Red Rock. Now, Alvarez also
5 determined that it would cost \$50,000 per location to replace
6 the signage containing the words Boulder Station, Palace
7 Station and so on, at a cost of a little over a million
8 dollars. With respect to the other trademarks being absolutely
9 assigned, Alvarez concluded that those trademarks had
10 absolutely no value.

11 That's not all that's happening here. Stations is
12 also licensing for free on an exclusive basis Boulder Station,
13 Palace Station, Sunset Station and Red Rock -- Red Rock
14 Station, sorry. Alvarez did not provide an indicative value
15 for this licensing. And then Stations also licenses for free
16 on a non-exclusive basis numerous other trademarks. There's
17 lots of others, like Boarding Pass and Jumbo Jackpot, and
18 things like that they use throughout their entire system.
19 Alvarez did not provide an indicative value for those licenses.

20 So now I've sort of explained what happened with
21 respect to the trademarks, let's look at what Alvarez did for
22 valuation purposes. Now they considered four methodologies to
23 determine its indicative value and this was the net book value
24 of brands, the fair share comparable analysis of revenues, the
25 25 percent rule of thumb, and then comparable transactions. As

1 we identified in our papers, the fair market value of a
2 trademark that you are selling is what a willing purchaser
3 would have paid a willing -- willing seller -- let me strike --

4 **THE COURT:** What a willing buyer would pay a willing
5 seller.

6 **MR. WINSTON:** Got it, thank you.

7 **THE COURT:** Not tainted by fraud or compulsion.

8 **MR. WINSTON:** Exactly.

9 **THE COURT:** Okay.

10 **MR. WINSTON:** The methodologies that Alvarez has
11 employed really relate to the licensing of trademarks, not to
12 the ownership of trademarks. And Alvarez did not engage in any
13 sort of analysis as to the ownership valuation. Putting that
14 aside, if you're going to look at what the value is from a
15 licensing perspective, that same 15 factor *Georgia Pacific*
16 test, which I mentioned with respect to patents, can be
17 extended to trademarks; it has been by a number of cases.
18 Further, Alvarez failed to identify or engage in very
19 rudimentary analyses when valuing trademarks. It didn't study
20 the geographic strength of the trademarks, didn't figure out if
21 any of the trademarks had developed a secondary meaning, didn't
22 test the strength of the marks generally, and there was no
23 survey regarding the customer recognition of the PROPCO casinos
24 with the Station brand in it and the value of the composite
25 marks if you were to strip out the name Station. Alvarez

1 didn't do any of that.

2 Now let's look at the comparables that Alvarez did
3 consider. According to the report, and then what Mr. Caruso
4 said in his deposition, Alvarez believes that there's two
5 casino trademark transactions that were comparable. One is a
6 casino in Hammond, Indiana and the other is a small casino in
7 Argentina. Now Alvarez offered absolutely no analysis to
8 determine whether a casino in Indiana and a casino in Argentina
9 is actually comparable to any of the four casinos in Las Vegas.
10 There's no discussion, there's no work papers, there's nothing
11 that indicates yes, in fact, these are comparable.

12 Now I did ask during the deposition, well why do
13 think they're comparable? And he said well, putting aside Red
14 Rock, the other three are small and local and tend to cater to
15 a local audience. This is why we put in the request for
16 judicial notice. Exhibit 3 of the request for judicial notice
17 is Mr. Haskins declaration in support of a state -- of a non-
18 bankruptcy court action to enforce its trademarks effectively.
19 It's trademark infringement, cyber-squatting --

20 **THE COURT:** I dealt with this in May -- or earlier in
21 May?

22 **MR. WINSTON:** Right, but this is Mr. Haskins
23 declaration. I'm not talking --

24 **THE COURT:** You're not talking about the complaint.
25 You're talking about --

1 **MR. WINSTON:** -- about the complaint, I'm talking
2 about Mr. Haskins' declaration. Mr. Haskins said he believed
3 that Boulder Station, Palace Station and Sunset Station have
4 become famous throughout the United States and the world. So
5 at least for purposes of wondering whether the Alvarez
6 methodology of picking a small casino in Argentina and a casino
7 in Indiana is comparable, at least according to Stations' own
8 officers, they seem to think that the casinos are pretty famous
9 beyond just Las Vegas.

10 Further, Exhibit 53 is a motion for default judgment
11 that Stations filed in January of this year, in the same action
12 for which Mr. Haskins submitted his declaration. That motion
13 repeated and referred to Mr. Haskins' statements in his
14 declaration in seeking the motion for default judgment. So
15 thus, even as late as this year, after the first compromise
16 motion was approved, and after it appears that the PROPCO
17 Lenders had chosen Fertitta Gaming, Station Casinos was still
18 taking the position that these casinos were famous throughout
19 the United States and the world. I therefore would submit that
20 comparing those three casinos, putting aside Red Rock, to a
21 casino in Indiana and a casino in Argentina, it just doesn't
22 fly.

23 There's other reasons why that comparable analysis
24 doesn't work. Each of those two casinos, the transaction, was
25 the licensing of trademarks on a non-exclusive basis. It was

1 not an assignment outright of the names. Consider Exhibit 45,
2 this is one of the two transactions -- the documents evidencing
3 the two transactions or discussing the two transactions that
4 Mr. Caruso and the Alvarez team looked at. It's on a non-
5 exclusive basis. So I asked during the deposition, did you
6 consider whether these transactions were comparable if they
7 didn't involve ownership? And the answer was, they didn't do
8 it. Another mistake with their comparables is that what is
9 being licensed is the name for operating a casino. Here, the
10 assigned trademarks go beyond operating a casino. It also goes
11 to merchandise and to room reservations, which Alvarez didn't
12 consider either.

13 So when trying to understand the value of the
14 trademarks and the -- I think it was \$16 to \$40 million
15 valuation range, I think Alvarez left a lot on the table when
16 it selected those two comparables. To make matters worse, it
17 actually used lower royalty rates than in the comparables,
18 because it believed it was justified in doing so because only a
19 portion of the trademarks were being transferred. So in the
20 Argentina casino case, the royalty rate was two percent of
21 gross income, for the Indiana casino it was 0.5 percent of
22 gross gambling revenues. And relying upon these alleged
23 comparables, for Boulder, Palace and Sunset, Alvarez picked 0.5
24 percent and for Red Rock it picked 1.5 percent. Aside from the
25 ownership versus licensing problem, there are four mistakes

1 here.

2 First, Alvarez did not account for the fact that even
3 -- that once even a portion of the trademarks are assigned,
4 Station Casinos loses the value of the goodwill that has been
5 built up in the composite market; just doesn't factor it in at
6 all. The reason why that's important is people -- a licensor
7 is going to charge more for a license if it's built up a lot of
8 good will into it. Indeed, he did, in fact, testify during his
9 deposition that the value of the composite mark is higher than
10 just the portions, but that will be gone -- that goodwill
11 that's behind that will be gone the minute it is assigned.

12 Second, in making the determination that it did,
13 Mr. Caruso admitted that Alvarez did not consider or examine
14 any comparables where only a portion of the trademark was being
15 licensed and did not consider, as I said before, any study to
16 test its strength of the marks with and without the name
17 Stations in them. I think they say the document, but as best I
18 can tell from the report, it wasn't part of the analysis, is
19 that in 2007 and 2008 Stations engaged Duff & Phelps to perform
20 two valuations, one was a purchase price allocation, the other
21 was impairment testing. And in part of those documents, it
22 looked at the trademarks. Exhibits 54 and 55 are the relevant
23 excerpts from each report.

24 In those documents, Duff & Phelps determined that the
25 royalty rate just for Station was 1.5 percent of all revenue.

1 And the basis for this analysis was the relief from royalty
2 approach, which in this case was the -- which when applied to
3 this case was the statement,

4 "Station realizes a benefit from owning the brands,
5 rather than paying a rent or royalty charge for the
6 use of these assets."

7 Now those two Duff & Phelps' reports did not
8 expressly address Red Rock, it didn't do so, but it did look at
9 Palms, and it concluded that was 2.0 percent royalty rate.
10 That is 0.5 percent higher than what they thought was worth for
11 Station. In the Alvarez report, Alvarez thinks Red Rock is a
12 full percentage point higher than Boulder, Palace and Sunset.
13 So if we were to just be a little quick and dirty with the
14 math, one would expect the Red Rock rate to be two-and-a-half
15 percent and the Station rate for the three casinos to be 1.5
16 percent. And then last, Mr. Caruso said the reason why they
17 used 1.5 percent for Red Rock is that well, Red Rock is part of
18 the Station casino brand, but Red Rock doesn't use the word
19 Station in its trade name or marketing. The actual name of the
20 facility is the Red Rock Casino Resort and Spa, no mention of
21 Station, which is different than the other three. So there is
22 no basis demonstrated to depart downward for Red Rock, as
23 Alvarez apparently thought was appropriate for the other three.
24 Now debtors have said that there's little value to these
25 trademarks once divorced from the word Stations, because in the

1 case of the three casinos, they refer to streets, and in the
2 case of Red Rock they refer to a geographic location.

3 Now I'm going to go back to request for judicial
4 notice, Exhibit 4, and this was one of the complaints that we
5 referred to. I think Your Honor mentioned it was unverified
6 and that's true. Even unverified complaints in non -- in
7 actions other than before this Court have the weight of
8 evidentiary admissions. That's why we've included it. And for
9 purposes of understanding the issue of whether Red Rock has
10 developed a secondary meaning above and beyond the geographic
11 location, there is now an evidentiary admission by Stations
12 that has not been contradicted by any competent evidence, that
13 it has in fact happened.

14 In 2006, in that complaint, right on the verge or I
15 think right after they opened up the casino, they said that
16 Stations had developed a secondary meaning for its trademark
17 Red Rock that had gone back a decade before. They had started
18 with beer, and then when they announced they were opening up
19 their casino, they had done a lot of marketing for the casino
20 when it opened up. The world knew the name Red Rock implied
21 their casino, not the geographic location. Alvarez completely
22 ignored that.

23 Indeed, request for judicial notice, Exhibit 5, is
24 the consent judgment that was entered in that action. And that
25 action, what they did, was make sure a saloon couldn't say --

1 call themselves the Red Rock Saloon. They had to take out the
2 word "Rock", so it became Red Saloon or I think they -- there
3 was a different variation of it, but it couldn't be Red Rock.
4 I don't know if a consent judgment would be equal to say like a
5 default judgment where no one responds to it, but there are
6 cases that hold a default judgment can give rise to judicial
7 estoppel, much less an evidentiary admission, that Stations
8 would be judicially estopped from taking the position that the
9 name Red Rock has no significance above and beyond the
10 geographic location.

11 **THE COURT:** Judgment judicial estoppel?

12 **MR. WINSTON:** A default judgment; there are cases
13 that hold that. I don't know if a consent judgment --

14 **THE COURT:** Are you talking about judicial estoppel
15 or are you talking about issuing a plan preclusion?

16 **MR. WINSTON:** Judicial estoppel.

17 **THE COURT:** Judicial estoppel requires reliance by a
18 judicial officer.

19 **MR. WINSTON:** If a Court enters a -- the theory is,
20 when a Court enters a default judgment based upon the
21 assertions in the complaint --

22 **THE COURT:** Oh, then it's relied upon --

23 **MR. WINSTON:** -- then it's relied upon.

24 **THE COURT:** Because the judgment itself may or may
25 not be -- have preclusive effects.

1 **MR. WINSTON:** Exactly. And I don't -- I'm not
2 suggesting issue or preclusion or --

3 **THE COURT:** Okay. I just want to make sure.

4 **MR. WINSTON:** No, I was careful with my words,
5 judicial estoppel. And not actually saying it has to apply
6 here --

7 **THE COURT:** It estops the Plaintiff who receives
8 the --

9 **MR. WINSTON:** Exactly.

10 **THE COURT:** -- default judgment.

11 **MR. WINSTON:** Exactly.

12 **THE COURT:** I understand what you're saying.

13 **MR. WINSTON:** I'm not saying it actually has to apply
14 here, but at minimum you have the evidentiary admissions that
15 are uncontradicted. Other than -- well, you have their
16 assertions saying well, we think it doesn't mean anything, but
17 there's no basis for it, and it doesn't make sense given what
18 they said in 2006.

19 Okay. So I look at as, I'm no expert when it comes
20 to trademarks. I'm not -- I don't deal with trademark
21 litigation, but I do point out again, that this Court is left
22 with a gaping hole in the record as to the value even with what
23 Alvarez did.

24 All right, last -- I'm going to skip over the other
25 trademarks that aren't getting -- didn't even get valued at all

1 that are getting transferred. I talked about that in the
2 pleadings. Let me talk last about the Wild Wild West. And
3 this one is -- our papers talked about again, Your Honor
4 referred to the newspaper article that we referred to and has
5 been admitted into evidence, so I do want to highlight the
6 following things.

7 As Your Honor already pointed out, Alvarez is not an
8 expert, certainly obtained no appraisal of the Wild Wild West
9 land. It just has sort of thrown out a number between a
10 million and a million two-fifty per acre. And then it did
11 consider a land transaction that occurred in November 2009, it
12 said in its report it didn't think the land was all that
13 comparable, but it did miss that February 2010 transaction for
14 a little over \$11 million per acre. I don't --

15 **THE COURT:** This according to the same news article
16 people are supposed to have some idea what goes on in this
17 transaction didn't think that that price -- that an operation
18 could be placed on that property that would justify that price?

19 **MR. WINSTON:** Absolutely. Absolutely.

20 **THE COURT:** It said it was non-sustainable, if I read
21 the article correctly. I have no idea.

22 **MR. WINSTON:** Your absolutely correct and what you
23 just said again hammers the point. You have no idea?

24 **THE COURT:** I have no idea why anybody would pay that
25 much for that piece of property, that's what I'm saying.

1 **MR. WINSTON:** Right. Let me add this, you have no
2 idea why a 90 percent departure from that most recent land
3 transaction is justified.

4 **THE COURT:** Well okay, I understand your position.
5 Go ahead.

6 **MR. WINSTON:** Okay. I'm now effectively done. I
7 have spoken for a long time, gone through a lot of details.
8 This is much more in the weeds than what my other colleagues
9 are going to do, but --

10 **THE COURT:** What about your point that you, I think -
11 - I thought it related to Wild Wild West, and if I
12 misunderstood please tell me, isn't this the property --
13 there's an assemblage of property and there's an option?

14 **MR. WINSTON:** There are two options.

15 **THE COURT:** And the consideration was that the strike
16 price far exceeds its value at the current time?

17 **MR. WINSTON:** Yes.

18 **THE COURT:** And your question is, well who knows what
19 it will be in the future?

20 **MR. WINSTON:** This was more in the independent
21 lenders' papers, but yes, we're sort of on the same side on
22 that. I --

23 **THE COURT:** Doesn't have it to be exercise -- isn't
24 there the one year time limit?

25 **MR. WINSTON:** For the two options? I --

1 **THE COURT:** Well, for the excluded assets and this is
2 part of the transaction, so you -- how far out in the future do
3 you have to go, is my question? If I read it correctly, it's
4 one year.

5 **MR. WINSTON:** For the two -- not Texas Point, but the
6 other --

7 **THE COURT:** No, no, the options -- but the point is,
8 in establishing the value now, you -- maybe it was in
9 Mr. Goldberg's papers, that I had to analyze -- it was improper
10 to analyze it now -- and it was in Mr. Goldberg's because he
11 also did the examination, that nobody could say what the value
12 would be in the future and maybe the property is going to go
13 up, and he tried to get the witness to say that that would
14 happen, the witness said I have no idea if the property value
15 is going to go up or down and neither do I or anybody in this
16 room.

17 The point being, when you read those -- I believe
18 it's the transfer - I think it's MX, when you read that has
19 that one year provision in it. So I was -- maybe Mr. Goldberg
20 can address that point, because I didn't think you have to go
21 too far. In other words, to make the determination whether or
22 not to exercise the option is going to have -- that question is
23 going to have to be answered within a year or so. That's how I
24 remember it.

25 **MR. WINSTON:** Your Honor, I will confess, I don't

1 know the answer, but I think -- I've been seeing some nods
2 here.

3 **THE COURT:** Okay. I'll be interested -- I didn't see
4 anybody address that and perhaps I misread it.

5 **MR. WINSTON:** All right. Let me close on this
6 point --

7 **THE COURT:** I mean, I understand the point. Nobody
8 has given any value, there's no basis for the values they've
9 given me for all these reasons.

10 **MR. WINSTON:** We're done.

11 **THE COURT:** Thank you.

12 **MR. WINSTON:** Thank you.

13 **THE COURT:** I'm sorry.

14 **(Court and Clerk confer)**

15 **THE COURT:** There apparently -- if anyone in this
16 courtroom has a white Nissan Altima, it is idling in the
17 parking lot and nobody is in it. It's a rental vehicle.
18 Somebody, if they have a Nissan Altima, failed to turn it off.

19 **MR. WINSTON:** I think it's one of the excluded
20 assets.

21 **(Laughter)**

22 **THE COURT:** The value of the gasoline has been
23 reduced by the time that it was idling. Ms. Steingart?

24 **MS. STEINGART:** Thank you, Your Honor. Which brings
25 us now -- we're still in second master lease compromise. The

1 issues with respect to excluded assets, as the Court is very
2 aware, is a factor in master lease and bidding procedures and
3 in OPCO Plan Support, but we go now to the rest of master
4 lease, which may also impact other agreements.

5 We go to the Texas put. Why in the world is it in
6 the second master lease compromise agreement? It's not related
7 to transition services, it's not related to rent, it's not
8 related to any of the PROPCO properties. There was testimony
9 confirming that at Page 175, Lines 22 to 176, Lines 23, at the
10 hearing. There is no evidence of actual negotiation, there is
11 no agreement signed by the landlord, there is no analysis by
12 OPCO of why this --

13 **THE COURT:** There was deposition testimony that
14 indicated the representative indicated value, they wanted 115
15 million. I thought that that was some evidence of negotiations
16 or did I misread the testimony?

17 **MS. STEINGART:** Well, there was testimony that the
18 position was taken by the owners of the put of 115 million.

19 **THE COURT:** Yeah.

20 **MS. STEINGART:** I haven't seen any emails from any of
21 the owners of the put, I haven't seen any --

22 **THE COURT:** Well, you may not like -- I understand
23 that, but don't say there's no evidence. I think that you
24 might say that there's very little evidence, but at least
25 there's some evidence that a price was put on the table, it was

1 \$115 million, and it was negotiated down.

2 **MS. STEINGART:** I think that there was evidence that
3 there was a price of 115, Your Honor, put on the table, but I
4 didn't see any evidence of discussions among people that
5 brought it down.

6 **THE COURT:** Except we know it got to 75?

7 **MS. STEINGART:** Yeah, I have no idea how it got to
8 75, Your Honor.

9 **THE COURT:** All right. I'm not sure that everything
10 in the world is reflected in letters or emails, but I do know,
11 as I have testimony, that said the representatives wanted 115,
12 they negotiated 75. The 75 is included in the 772, it's not
13 included in the 772 if somebody else buys it, and somebody else
14 -- and some third-party bidder, which is the problem that you
15 have with the entire Texas put situation.

16 **MS. STEINGART:** It's a problem I have and the other
17 problem I have is, is who the people are on both sides of the
18 negotiation.

19 **THE COURT:** I got that.

20 **MS. STEINGART:** Okay. And so, because of those
21 issues, I find it -- and because usually when transactions of
22 this size are dealt with by actual opposing parties, you see
23 pieces of paper and you see other things.

24 **THE COURT:** So you say the absence of what you'd
25 normally see, perhaps indicates what, there was no negotiation?

1 **MS. STEINGART:** I think --

2 **THE COURT:** It just went down 40 million by itself?
3 I don't understand that.

4 **MS. STEINGART:** Neither do I.

5 **THE COURT:** Okay.

6 **MS. STEINGART:** There's no evidence of how or why or
7 under what circumstances it occurred or if it was actually, you
8 know, a negotiation, as opposed to some number that an insider
9 sort of said this is the number that we think -- we'll make
10 sure that we get these assets, okay. We have no idea how that
11 happened. There's no analysis by OPCO of why Texas Station, in
12 connection with other non-debtor subs, cannot be placed in
13 Chapter 11. It is significant that the beneficiary of the put
14 is a Fertitta family member. The liability of this put may
15 have a direct impact on the recovery of unsecured creditors.
16 \$75 million amounts to about 10 percent of the value of the
17 stalking horse bid. It's a meaningful amount and it's clear
18 that if a fair auction process is approved, we will have other
19 bidding participants who will care about this number.

20 As the Court has seen from Exhibit --

21 **THE COURT:** Which apparently Boyd has?

22 **MS. STEINGART:** Boyd has, and they care about the
23 number. I'm not really sure how much or what the caring was
24 about the number --

25 **THE COURT:** Well, there was testimony regarding what

1 Boyd's attitude was about that.

2 **MS. STEINGART:** There was hearsay about what Boyd's
3 attitude was about that. We haven't heard from Boyd and
4 hopefully Boyd will participate in the auction. But also, as
5 can be seen from Exhibit 34, which is one of the things under
6 seal that I'm not going to talk about in detail, there's
7 another strategic buyer with some knowledge of these assets,
8 not a financial buyer, not someone unfamiliar with this
9 company, that has put a number in excess of the OPCO secured
10 debt on the table.

11 Absent the liability on the Texas put, this
12 indication of interest would put unsecured creditors well into
13 the money. So the fight on the Texas put is an important one
14 and it's a fight that we believe a debtor, whose sole interest
15 was in providing to a recovery to creditors, would have
16 undertaken. And --

17 **THE COURT:** I thought about this. I thought about
18 this because -- ask that, some question about the 75 million
19 and that's when he talked about the 35 million credit. I'm not
20 sure that I fully understood his response regarding the 75.
21 Seventy-five would be the -- I know your point is that it may
22 start to be paid by OPCO even if there was no transfer of
23 assets, I'm aware of that argument, but I think your argument
24 is, is that that 75 million would have to be paid by any third-
25 party purchaser.

1 **MS. STEINGART:** Or it would reduce the value that
2 OPCO, as an entity, would receive.

3 **THE COURT:** Seventy-five million being the settlement
4 amount as to a discount rental, whatever the formula is, as
5 provided in whatever the documents are. I think that that
6 ground lease, that was Mr. -- that was the exhibit to
7 Mr. Friedman's declaration, I think, if memory serves me
8 correctly, I took a look at that. The point being is, I want
9 to make sure I understand your argument, is that any buyer
10 knowing that they have a \$75 million obligation would probably
11 reduce their offer by that \$75 million.

12 **MS. STEINGART:** Well, if it's an agreement that's
13 approved by the Court and embodied in these other documents, I
14 don't think that they would have any choice, Your Honor.

15 **THE COURT:** My question to you would be, how would
16 they be able to make a determination regarding their bid in the
17 absence of this agreement, that knowing the potential liability
18 is out there and knowing, if they've paid any attention to
19 what's going on, that at least it is alleged and under oath
20 asserted that a representative of the landlord said it was
21 worth 115 million.

22 **MS. STEINGART:** I do understand that. I think that
23 having an understanding of what others would value that
24 liability at and how long and under what circumstances they
25 would request possibly that funds be escrowed, is an important

1 part of the process. If the bidding gets above -- or gets
2 above where we are now, certainly if the funds that -- if there
3 are sufficient funds to pay the OPCO Lenders, and that money is
4 going to be escrowed, that might be something that we would
5 have an interest in seeing pursued. It depends on where the
6 bidding ends up, what significance that is.

7 **THE COURT:** Seeing what pursued? I want to make sure
8 I understand you.

9 **MS. STEINGART:** Seeing the -- you know, whether a
10 better price on the Texas put can be achieved by having people
11 actually involved in the negotiations who have a tangible
12 benefit from it. Our view -- stepping back for a moment, Your
13 Honor. Our view is that a number was achieved that satisfied
14 the secured lenders and that was 87 cents on the dollar, and
15 that's a nice recovery. If I was a secured lender, maybe I'd
16 be satisfied with that as well. And then there was a situation
17 where these other bells and whistles were attached and there
18 was less interest in the number being zero. Certainly, the
19 upside from any value left on the table by the OPCO secured
20 lenders to the benefit of Fertitta Gaming, and the controlling
21 lenders in their PROPCO hat.

22 So they reached a number that they were happy with
23 it. It could be that someone who was more aggressively seeking
24 value would want that number to be higher, and that's us, Your
25 Honor. And I don't think that there needs to be a risk by

1 having that -- by having the Texas put be part of the auction
2 process and by having Texas put -- Texas Station consider the
3 possibility of filing for bankruptcy.

4 **THE COURT:** Are you telling me that I should consider
5 denying plan confirmation if a company doesn't file bankruptcy?

6 **MS. STEINGART:** No, I'm not saying that at all, Your
7 Honor. I'm saying that people who bid on the Texas put will
8 mark up --

9 **THE COURT:** The Texas put is not separately being bid
10 on.

11 **MS. STEINGART:** Okay. People who bid on the package
12 of assets will have an indication of how their bid is being
13 impacted by the value of the Texas put. If you look at the
14 bidding procedures now, the revised bidding procedures asks
15 bidders to describe the characteristics or the impact of the
16 Texas put on their bid. And so I think bidders can indicate if
17 they are bidding less or if they want a portion of the bid held
18 in escrow until some -- until they, or others, negotiate with
19 the owners of the put. And just as an aside, Your Honor, in
20 the asset purchase agreement, there is provision for putting
21 Texas put -- Texas Station into Chapter 11.

22 **THE COURT:** My question is this -- because I'm not --
23 if I'm a third-party bidder at the auction, are you saying that
24 the bidder should be able to segregate that portion of its bid
25 that relates to the Texas put?

1 **MS. STEINGART:** To whatever uncertainty they perceive
2 is created by the Texas put. There may be a bidder that puts
3 it at zero, Your Honor.

4 **THE COURT:** And what would be the point of that,
5 unless they thought they had some, what, legal challenge to the
6 put, assuming that 365(f)(1) is not even applicable, because
7 they're not -- it's not a debtor in bankruptcy, that for some
8 other -- that it would want to study the formula to be able to
9 figure out what the value would be? I don't understand.

10 **MS. STEINGART:** Well, Your Honor, the asset purchase
11 agreement currently provides that Texas Station will be in
12 bankruptcy. It provides that Texas Station will be put into
13 Chapter 11.

14 **THE COURT:** Okay.

15 **MS. STEINGART:** Okay. And I'll show you where --

16 **THE COURT:** And then, what you're saying is, the
17 asset purchase agreement --

18 **MS. STEINGART:** -- it says that.

19 **THE COURT:** -- which is the agreement upon which the
20 stalking horse is proceeding, states that Texas Station will be
21 placed into --

22 **MS. STEINGART:** Chapter 11.

23 **THE COURT:** -- Chapter 11 and then you're saying at
24 least the effort could be made under 365 to find that this was
25 a violation of the anti-insider -- anti-anti assignment

1 provision?

2 **MS. STEINGART:** Right. And, Your Honor, I do
3 believe --

4 **THE COURT:** All right. I get your point.

5 **MS. STEINGART:** -- that given the magnitude of the
6 liability, that a debtor whose sole interest was in providing
7 recovery to creditors would have undertaken that challenge.

8 **THE COURT:** All right.

9 **MS. STEINGART:** And that there are people who will
10 undertake that challenge. And importantly, the law in the
11 Circuit supports the conclusion that the put is an unreasonable
12 restraint on assignment under 365(a).

13 **THE COURT:** I'm not going to review all those cases.
14 I've looked at them. I'm not going to even begin to give an
15 advisory opinion.

16 **MS. STEINGART:** And I don't want an advisory opinion,
17 Your Honor, but I do -- but I think that the important point
18 here is that there's significant authority to make that way
19 more than --

20 **THE COURT:** There is certainly a significant dispute.

21 **MS. STEINGART:** It is a significant dispute and --
22 and, you know, the hockey case is just not relevant. So, you
23 know, so I think that there's a dispute and there's significant
24 authority that would support the proposition and it's
25 surprising that the debtor, given the magnitude of this, hasn't

1 pursued it.

2 Bidding procedures. The purchase and sale agreement,
3 which has now become the asset purchase agreement, that was
4 delivered yesterday evening is not executed, Your Honor. I
5 haven't seen an executed one. Here again, some of the
6 termination provisions make it unclear, even if this has
7 actually been signed, whether the stalking horse agreement or
8 the APA has any vitality. Here again, as we will show, all the
9 infirmities discussed at length earlier caused by incorporation
10 of plan support agreement make this agreement stillborn.

11 Now just so that we're clear on this, we have not
12 seen, as is required by the Revised Bidding Procedures, Section
13 N1B, an irrevocable commitment. We have not seen, as required
14 by bidding procedures N1K, a good faith deposit. The
15 commitment letter that was required under the OPCO plan
16 restructuring agreement and provided as attached to an SEC
17 filing on May 5th, raises real issues. And Your Honor, that's
18 at Exhibit 75.

19 I'd like to draw the Court's attention to Exhibit 75
20 and to the beginning of the second full paragraph.

21 **THE COURT:** One moment.

22 **MS. STEINGART:** At the beginning --

23 **THE COURT:** What page?

24 **MS. STEINGART:** The first page. Okay, at the
25 beginning of the second full paragraph it says, "Subject to the

1 conditions set forth herein and in the RSA." And as you can
2 see above, the RSA is the restructuring support agreement
3 and --

4 **THE COURT:** That's OPCO restructuring --

5 **MS. STEINGART:** That's the OPCO --

6 **THE COURT:** I know that.

7 **MS. STEINGART:** Okay. So anything in this letter is
8 subject to the conditions in the OPCO Restructuring Support
9 Agreement, Your Honor. And just to complete the picture, on
10 Page 2 -- on Page 2, in the third full paragraph on the page it
11 says,

12 "This letter agreement shall automatically terminate
13 and be of no further force or effect without further
14 action by the parties hereto upon termination of the
15 restructuring support agreement."

16 So in essence, this imports all conditionality in the
17 OPCO Restructuring Support Agreement. Hardly a very strong
18 commitment, given the outs in the OPCO Restructuring Support
19 Agreement. And maybe we can just look at those briefly. This
20 has previously been marked as Exhibit -- it's one of the
21 earlier exhibits, the restructuring support agreement. It's
22 either 1, 2, 3, 4 or 5, gentlemen?

23 **MR. WINSTON:** Five.

24 **MS. STEINGART:** It's Exhibit 5, Your Honor. Let's
25 look at these, and fortunately for us, they're right at the

1 beginning. They're the second section of the OPCO
2 Restructuring Support Agreement.

3 **THE COURT:** Go ahead.

4 **MS. STEINGART:** Now for instance, there are
5 termination events here that have already occurred.

6 **THE COURT:** What page are you on?

7 **MS. STEINGART:** I'm on Page 7 of the OPCO
8 Restructuring Support Agreement, it's at Section 2, titled
9 "Termination Events."

10 **THE COURT:** I'm there.

11 **MS. STEINGART:** Okay. There are some of these
12 termination events that have already occurred, as in 2.1(g),
13 the May 1st deadline, 2.1(i), the May 10th deadline, 2.1(w),
14 the May 5th deadline. There are a number of discretionary
15 termination events as well; 2.1(t), Fertitta Gaming announcing
16 it will not support the plan, 2.1(0), the termination of the
17 asset purchase agreement. And importantly, perhaps, Your
18 Honor, most importantly, 2.1(y), 2.1(y) incorporates, by
19 reference, all of the termination events of the PROPCO Plan
20 Support agreement into the OPCO Plan Support agreement. So we
21 have a commitment letter here that is conditional. A
22 commitment letter that is optional at this point because of the
23 triggering events that have already occurred.

24 With respect to the APA, the APA itself has
25 termination events that include, on Page 30 -- and I need to

1 just get mine out -- on Page 30, in Section 4.4, and I think
2 it's L --

3 **THE COURT:** One moment, please. Thirty?

4 **MS. STEINGART:** Thirty.

5 **THE COURT:** Of the APA?

6 **MS. STEINGART:** Right. And just so that the Court is
7 clear, on Page 28 the termination events begin in Section 4.4
8 and continue onto 29 and then onto 30.

9 **THE COURT:** Right.

10 **MS. STEINGART:** And termination event in 30(1) is by
11 purchaser at any time prior to June 21, 2010, if purchaser is
12 not satisfied with its tax diligence of the tax consequences of
13 the transactions contemplated under this agreement. And we
14 will see how this also conflicts with the portion of the
15 bidding procedures themselves, which indicates that there can't
16 be a due diligence out. So this creates conditionality in the
17 asset purchase agreement and a sort of tension with a revised
18 bidding procedures.

19 And, of course, we have 4.4(m), which is a
20 termination event of the APA, and 4.4(m) deals with the
21 purchaser or seller can terminate if the OPCO Plan Support
22 agreement has been terminated, and the OPCO Plan Support
23 agreement has all of its termination provisions and has all the
24 termination provisions in the PROPCO Plan Support agreement.
25 So again, this makes the APA optional with respect to the

1 purchasers and I think that that reflects some concerns that we
2 have at this point with respect to the asset purchase
3 agreement.

4 The PROPCO -- did you have a question, Your Honor?
5 No. Okay. The PROPCO --

6 **THE COURT:** Except, you know, if somebody were to
7 attempt to exercise some of those timing deadlines, apparently
8 -- at least as I read them, that have past or cannot be
9 satisfied as a result of a request to extend the hearing dates,
10 do you think we'd go much further? Do you think I could
11 confirm a plan making the finding as required by 1129(a)(3)? I
12 understand your fears, but I think if somebody were to do that,
13 we would have a far different discussion.

14 **MS. STEINGART:** Well, Your Honor, we might --

15 **THE COURT:** I could be wrong.

16 **MS. STEINGART:** But my concern is about the
17 optionality between now and when the bidding is over. And my
18 other concern is that this is the model --

19 **THE COURT:** I think we can deal with those issues.

20 **MS. STEINGART:** Right.

21 **THE COURT:** But are legitimate points.

22 **MS. STEINGART:** Right.

23 **THE COURT:** But --

24 **MS. STEINGART:** Right, but we've only had less than
25 24 hours, you know, to look at this, but also this is the

1 model. This is going to be the model for other purchasers and
2 there's no reason why, if the bidding procedures say --

3 **THE COURT:** Obviously I'm not going to go forward
4 unless the timing provisions reflect the reality of what's in
5 here. I mean, I'm not about to engage in that type of a
6 process.

7 **MS. STEINGART:** The other thing that we wanted to
8 point out is that the commitment letters that have been
9 provided, along with the APA, by the two banks have the same
10 termination provisions and conditionality as were in -- present
11 in the letter from Fertitta Gaming that we've just discussed.
12 I won't go through it, but sufficed it to mention, and they're
13 attached to the APA.

14 **THE COURT:** Oh, I have no doubt that they're
15 consistent.

16 **MS. STEINGART:** As I mentioned before, Your Honor,
17 the APA conflicts the bidding procedures. N1E states that a
18 qualified bid shall not be conduct -- conditioned on the
19 outcome of due diligence and they have the due diligence --

20 **THE COURT:** And now you're talking about the --

21 **MS. STEINGART:** Right.

22 **THE COURT:** Excuse me, let me make sure I under --

23 **MS. STEINGART:** The bidding procedures at N1E --

24 **THE COURT:** Right, let me turn --

25 **MS. STEINGART:** Sure.

1 **THE COURT:** -- because I went through those.

2 **MS. STEINGART:** And I don't have a page for that, I'm
3 -- I apologize.

4 **THE COURT:** I'm getting there. It's okay, because N
5 goes on for awhile.

6 **MS. STEINGART:** Right.

7 **THE COURT:** I paid particular attention to N1C, I
8 looked at the change at the bottom of that. N1E, I'm aware of
9 that.

10 **MS. STEINGART:** Right.

11 **THE COURT:** I've already reviewed that. I have some
12 issues with P, perhaps. I have an issue with RE -- is that
13 right? Yeah, R1E. I think I understand what F says. I have -
14 - I looked at T, I've got an issue that we need to discuss
15 regarding T. I need some explanation for X. And here is where
16 I went through, Schedule 3 is the same as B-1, and that's where
17 I made -- that's where I checked to make sure they were the
18 same. Okay, now that we've clarified that earlier when I
19 looked at B-1. So I've looked -- I've paid a lot of attention
20 to N.

21 **MS. STEINGART:** Right. Well, the APA as it currently
22 exists now, because of the due diligence out, conflicts with
23 this provision.

24 **THE COURT:** I think that can be resolved.

25 **MS. STEINGART:** Okay. Right. And N1D states that a

1 bidder shall have a firm, irrevocable commitment, and certainly
2 the current APA --

3 **THE COURT:** And your point is that conditional is not
4 irrevocable.

5 **MS. STEINGART:** Right. Move on. We've discussed
6 briefly before, Your Honor, the PROPCO option to take the
7 assets or not take the assets. And we did that in the context
8 of our overall discussion, would a better price make it better.
9 And I think we've sort of covered that, but I didn't want to
10 fail to include it here, Your Honor.

11 **THE COURT:** Point me to the exact provision which
12 you're referring to.

13 **MS. STEINGART:** I'm sorry?

14 **THE COURT:** Please point me to the provision which
15 you relied upon for that.

16 **MS. STEINGART:** It's at AC2 --

17 **THE COURT:** Of?

18 **MS. STEINGART:** I'm sorry, A2C on Page 3 of the
19 bidding procedures.

20 **THE COURT:** Let me turn to that.

21 **MS. STEINGART:** A2C, I misspoke, on Page 3.

22 **THE COURT:** Okay. Maybe you can see it, is that what
23 I've -- I've highlighted certain portions.

24 **MS. STEINGART:** Okay.

25 **THE COURT:** Is this where it states the OPCO property

1 -- 2 says, "The OPCO properties do not include any of the
2 following" --

3 **MS. STEINGART:** Right.

4 **THE COURT:** -- and C says, "Any of the assets
5 specified on Schedule 3 attached hereto, collectively the New
6 PROPCO purchase assets."

7 **MS. STEINGART:** Right. And then at the end of it,
8 Your Honor, that goes over onto Page 4, it says none of the
9 excluded assets will be subject -- will be the subject of the
10 sale to any party other than the stalking horse bidder,
11 unless --

12 **THE COURT:** PROPCO or its designee decides not to
13 purchase it?

14 **MS. STEINGART:** Right. Okay. And then -- and then
15 that, Your Honor, is repeated on N1C --

16 **THE COURT:** That's -- and I already mentioned N1C.

17 **MS. STEINGART:** Right, at Page 13 to 14.

18 **THE COURT:** I wanted to make sure I was in the same
19 place you were.

20 **MS. STEINGART:** Yes. Yes.

21 **THE COURT:** Okay.

22 **MS. STEINGART:** Those were the provisions. So there
23 all the excluded assets in the bid procedure, you know, has
24 already been discussed. Problematic that when these were first
25 put together and Lazard opined as their reasonableness -- as to

1 the reasonableness of the original bid procedures on the 19th
2 and when the board considered it, no one really thought about
3 the economic irrationality that was brought out during the
4 examination of Mr. Haskins, neither Dr. Nave, nor Lazard,
5 brought that to the attention of the board. And as the revised
6 bid procedures still create a burden for competing bidders with
7 respect to the excluded assets because of the pricing that we
8 discussed.

9 The bidding procedures also fail to isolate those
10 whose loyalties are not solely to OPCO from the decision making
11 process. There are a number of instances in the bid procedures
12 where there is the exercise of discretion. Now there has been
13 some adjustment to the bid procedures and I understand that,
14 you know, there is some language at the beginning about Dr.
15 Nave being the voice or something like that of the bidders.
16 However, there is still a number of discretionary provisions in
17 the OPCO -- in the bid procedures that don't include Dr. Nave.
18 To the extent that --

19 **THE COURT:** That do not include?

20 **MS. STEINGART:** Which do not include under the
21 direction of Dr. Nave. There are still a number of
22 discretionary items that don't include that and we can go
23 through those if you'd like, Your Honor.

24 **THE COURT:** Yes, I would.

25 **MS. STEINGART:** Okay. The ones that haven't been

1 revised to include Dr. Nave are Section F, a potential bidder
2 must coordinate any contact --

3 **THE COURT:** Let me take a look.

4 **MS. STEINGART:** Sure.

5 **THE COURT:** Because I went -- I had -- this is
6 exactly what I was looking for. Notwithstanding anything
7 herein to the contrary?

8 **MS. STEINGART:** Uh-huh.

9 **THE COURT:** I've already highlighted that, let's just
10 read that.

11 "Notwithstanding anything herein to the contrary, so
12 long as it's reasonably practical, potential bidder
13 that desires to contact the committee, OPCO, any
14 member of the OPCO steering committee, or the PROPCO
15 lenders, or their respective advisors, to discuss
16 shall coordinate with the OPCO debtors' advisors who
17 will promptly act."

18 To me, that was a coordination issue. I didn't see
19 really the exercise of discretion; it just provides a process.
20 So I wasn't overly concerned, but I had looked at it. What's
21 the next one?

22 **MS. STEINGART:** J -- Section J.1, Your Honor.

23 **THE COURT:** "Unless a potential bidder has hereto
24 executed a confidentiality agreement."

25 **MS. STEINGART:** Right. In form and substance

1 satisfactory to OPCO. And we see it in other circumstances
2 where that consumed substantial amounts of time in connection
3 with others trying to look at these assets.

4 **THE COURT:** Okay. Next.

5 **MS. STEINGART:** Section N1 -- oh, I'm sorry, not N1,
6 Your Honor, L1.

7 **THE COURT:** One moment, please. I have already
8 looked at that. The --

9 **MS. STEINGART:** Okay.

10 **THE COURT:** The debt --

11 "OPCO Debtor shall, subject to competitive and other
12 business considerations, and the rights hereunder
13 regarding the conduct of the auction, afford each
14 qualified bidder, and any person seeking to become a
15 qualified bidder, that has executed a confidentiality
16 agreement" -- I guess that relates back to J1 --
17 "with the OPCO Debtor such due diligence access to
18 materials and information relating to the OPCO
19 properties and related to liabilities as the OPCO
20 Debtors reasonably deem appropriate after
21 consultation with the consultation parties."

22 **MS. STEINGART:** Right.

23 **THE COURT:** So what I saw there was yes, the OPCO
24 Debtors did have some discretion, but they had to consult with
25 the consulting parties, which included the committee --

1 **MS. STEINGART:** It does.

2 **THE COURT:** -- and I will tell you if these bidding
3 procedures become part of an order of mine, I expect them to be
4 followed in good faith. And if you believe they're not, then
5 any one of these are subject to a court review if brought to my
6 attention, and that should provide anybody with enough solace.

7 **MS. STEINGART:** Thank you, Your Honor.

8 **THE COURT:** What's next?

9 **MS. STEINGART:** L2 has the same --

10 **THE COURT:** Same --

11 **MS. STEINGART:** -- that Debtors may deny request --

12 **THE COURT:** Same thing.

13 **MS. STEINGART:** Okay.

14 **THE COURT:** I think there was -- I found this far
15 superior, just to let you know when I went through it, because
16 it does provide the committee with the ability to participate
17 in the consultation if the committee, or any of the other
18 parties, consultation parties, believe -- and not just -- I
19 mean, truly believe that there has been an absence of good
20 faith or unreasonable behavior, I would be glad to consider it
21 and consider it on an expedited basis, because of the
22 importance and the nature of this entire proceeding, and that's
23 how I was going to deal with those issues. I just -- I was
24 aware -- what's -- I want to make sure I didn't overlook. What
25 did you have next?

1 MS. STEINGART: Okay. N1C.

2 THE COURT: Yeah.

3 MS. STEINGART: It has consultation, but the bidder
4 must submit an executed purchase agreement, which must be in
5 form acceptable to the debtors.

6 THE COURT: Yeah.

7 MS. STEINGART: P1 --

8 THE COURT: It says in form acceptable to the debtors
9 after consultation with the --

10 MS. STEINGART: After consultation. It does have
11 consultation.

12 THE COURT: So I -- I read that -- of course, this is
13 the provision that contains the 17.5 overbid.

14 MS. STEINGART: Right.

15 THE COURT: And then I looked at the next one as
16 well. I highlighted the next provision, just so I make sure I
17 understand it, but go ahead. What's your next one?

18 MS. STEINGART: Right.

19 THE COURT: I just want to show you that I have
20 considered this. Go ahead.

21 MS. STEINGART: P -- R1C.

22 THE COURT: R1C, one moment. Well, I'm going to
23 bring up one just so they can deal with it.

24 MS. STEINGART: Right.

25 THE COURT: My P1, where it says,

1 "If the OPCO Debtors do not receive any qualified
2 bids in addition to the stalking horse bid, the OPCO
3 Debtors reserve the right in consultation with the
4 consultation parties" -- so once again, the
5 protection is there -- "to terminate the sale process
6 or extend subject to the terms of the deadlines set
7 forth without further notice."

8 Somebody is going to have to ask me. It has see
9 court approval. As I said, if this is going to be an auction
10 that's going to be conducted under the auspicious of this
11 Court, then I think I have to -- I don't think I can abdicate
12 my judicial responsibilities.

13 **MS. STEINGART:** Right. Well -- well --

14 **THE COURT:** So that's when -- and that's further
15 protection.

16 **MS. STEINGART:** Yes.

17 **THE COURT:** Now go to R.

18 **MS. STEINGART:** R.1C.

19 **THE COURT:** 1C. "At least two business days" what's
20 your issue there? I've read this. That's a starting bid.

21 **MS. STEINGART:** Right. That the debtors, in their
22 discretion, shall determine the highest or otherwise best
23 offer, with which to start the auction. Now, that is in
24 consultation with the consultation parties.

25 **THE COURT:** I would expect if there's disagreement, I

1 would hear long and hard about it. And once again, that's the
2 other built-in protection of making sure it's in the plan
3 process. Yeah, they're in here and if anybody feels that
4 they've been breached or violated because it will be part of my
5 court order, that's what I do.

6 **MS. STEINGART:** Well, when we get to R1F, Your Honor,
7 which is also one of those, I presume we will be here under
8 Court supervision.

9 **THE COURT:** Yes.

10 **MS. STEINGART:** So we had --

11 **THE COURT:** That's -- oh, the bidding itself?

12 **MS. STEINGART:** Yes.

13 **THE COURT:** Yeah, that's -- and I want to talk --
14 well, we'll get to that in a moment.

15 **MS. STEINGART:** Okay. Which brings us, Your Honor,
16 to --

17 **THE COURT:** I'm not going to allow -- my problem is
18 E, you didn't even talk about it. My problem -- take a look at
19 E. The OPCO Debtors under the director and Dr. James Nave --
20 by the way, I read his deposition. I know there's a lot of --
21 I understand the releases, I understand all of that. I took
22 some comfort in his examination, just to let you know that, but
23 I still am going to keep -- if it's going to be under my
24 supervision, it will be under my supervision. I don't know how
25 else to do it.

1 So here we say,
2 "The OPCO Debtors, under the director and Dr. James
3 Nave, SCI's independent director, and after
4 consultation with the consultation parties, may
5 employ and announce at the auction additional
6 procedural rules that are reasonable under the
7 circumstances."

8 No, I think they can ask the Court to adopt
9 reasonable procedural rules. That's the way it should happen.
10 I don't think -- and it isn't -- I hope it isn't a matter of
11 judicial lido, but I don't think that parties can come in and
12 say, Judge, here's what you're going to do. If they want to do
13 that, they probably should find another venue, because I think
14 I ought -- I think I'm capable of understanding the
15 practicalities and realities of the situation, but I think to
16 have a truly transparent process, it has to be under the
17 Court's auspices, or else there's an absence -- perhaps there's
18 an absence of process, so that -- and once again, that builds
19 in protection for all the other parties, including your
20 clients.

21 **MS. STEINGART:** It does, Your Honor.

22 **THE COURT:** So -- and then the bidding, I will run.
23 Certainly reduces any commission.

24 **(Laughter)**

25 **THE COURT:** And I wanted to make sure I -- I will

1 tell you, as I read it, I did not have any problems with the
2 bidding procedure as set forth herein.

3 **MS. STEINGART:** Okay.

4 **THE COURT:** As to the conduct of the auction itself.
5 I don't have any -- I mean, I understand there's argument about
6 the 17 part, I get that.

7 **MS. STEINGART:** Right. Right.

8 **THE COURT:** But as to the process itself, I think
9 that the process is appropriate. I would have no problems
10 using that.

11 **MS. STEINGART:** Right. Well, Your Honor, you know,
12 you know we do have some difficulties with Dr. Nave. No
13 evidence has been presented to suggest that he can distance
14 himself from the Fertittas, no questions were raised to protect
15 the interest of OPCO when it was --

16 **THE COURT:** But hasn't that been greatly ameliorated
17 by the change to the bidding process and by the participation
18 by this Court?

19 **MS. STEINGART:** Well no, Your Honor, because the
20 bidding procedures cover a significant period of time, there
21 are many discretionary decisions that need to be made. I know
22 that people can keep calling you or running to you, that is
23 really not the process --

24 **THE COURT:** I don't expect that to happen with good
25 lawyers.

1 **MS. STEINGART:** Right. Right.

2 **THE COURT:** That's why you have the consultation
3 parties.

4 **MS. STEINGART:** Right. And we don't expect it to
5 happen either, but --

6 **THE COURT:** And that's why I asked you the question I
7 asked you before. I think we all understand where we want to
8 be at the end of the day, I mean to get the greatest price
9 possible, to protect the constituencies, to keep people
10 employed, to keep these operations open because that's how you
11 preserve value and maximize the assets for the benefit of
12 everyone, that we have a -- I totally agree with you about the
13 process.

14 **MS. STEINGART:** Okay.

15 **THE COURT:** So I don't -- I think we're capable of
16 doing that. And I think I made mention of this last -- earlier
17 in the proceedings, that I had issues regarding what I thought
18 was too much discretion being placed in one person. I think
19 that that has been greatly ameliorated. I'd be glad to listen,
20 and of course will -- and I think I have, I've tried to find --

21 **MS. STEINGART:** You have listened, Your Honor.

22 **THE COURT:** I've tried to find the issues that I
23 found in the document myself that will -- I want to foster
24 competence in the process.

25 **MS. STEINGART:** Right. That's -- just as we do, Your

1 Honor.

2 **THE COURT:** That's what I'm trying to do.

3 **MS. STEINGART:** Okay. You know, I'm sure once
4 adjustments are made to ensure that the Court can review
5 anything that has a material impact on the process and the
6 committee is involved, and hopefully we will have a collegial
7 and professional open process --

8 **THE COURT:** I don't know that I'll ever be able to
9 resolve the fundamental disputes that exist, because they do
10 exist, and I understand those.

11 **MS. STEINGART:** Right.

12 **THE COURT:** But that isn't the point of the process.

13 **MS. STEINGART:** It's not the point. And, Your Honor,
14 what we want is a process that is fair and that is seen to be
15 fair and is seen to be one that people who will be investing
16 time and money in sort of, you know, bidding for these assets,
17 you know, feel that they will be able to engage in, in a level
18 way. And, you know, to the extent that that's achieved -- we
19 are in the agreement with the Court on the --

20 **THE COURT:** For me, the bidding process is
21 independent of the considerations regarding what is being sold
22 and what isn't being sold, really the APA issues. And if I'm
23 satisfied with the process, that still preserves all of your
24 arguments and all of your positions, if not now, certainly at
25 the time of plan confirmation, because the sale is not complete

1 until plan confirmation and when we can make all those
2 determinations.

3 **MS. STEINGART:** Right. Right. We do understand the
4 sale is not completed until plan confirmation, but we want
5 people to come in and bid a lot of money.

6 **THE COURT:** I do too.

7 **MS. STEINGART:** And we want them to bid on all of the
8 assets so that we have a fair value.

9 **THE COURT:** I understand your position. Got it.

10 **MS. STEINGART:** Last thing we have is the OPCO Plan
11 Support agreement and I am -- you know, at this point I think
12 that we have said -- made the arguments with respect to that
13 and presentations in our brief in opposition to that. We do
14 think that it will remain viable without the debtors and
15 importantly, it is a violation of 1125, 1126. If there are any
16 questions the Court has --

17 **THE COURT:** No, I don't.

18 **MS. STEINGART:** -- we're happy to address those.

19 **THE COURT:** And I appreciate the argument.

20 **MS. STEINGART:** Thank you, Your Honor.

21 **THE COURT:** All right. This took a little longer
22 than we thought.

23 **MS. STEINGART:** I'm sorry. I apologize.

24 **THE COURT:** No, that's all right. You don't have to
25 apologize. When you're dealing with this -- it's a lot of --

1 these are significant, important issues and they deserve to
2 have full discussion and that's why I've asked the questions
3 that I've asked. I assume people wanted me to read these
4 pleadings and if I had questions to ask them, and that's what
5 I've tried to do.

6 Mr. Goldberg, I know you're going to argue. I think
7 we covered a lot of what -- at least, I thought Mr. Winston
8 went into pretty exhaustively. I'm going to give you your
9 chance to argue. I'm going to ask you, please not to be
10 duplicative of --

11 **MR. GOLDBERG:** I really try not to be duplicative in
12 my argument and I've been trying to slice things down as we go.

13 **THE COURT:** Thank you. I just appreciate it. I'm
14 not trying to cut you off, but just be aware of it, because I
15 really would like to get as much done today as we can.

16 **MR. GOLDBERG:** I understand. That's my goal as well.

17 **THE COURT:** Because, you know, everybody who is here
18 is working and some people are charging a lot of money and we -
19 and that's fine. That's not a criticism. My point is, is that
20 the sooner we get it done, the -- as long as everybody has a
21 full and fair opportunity to be heard, the better off we are.
22 And we're coming up -- people have flight schedules and we're
23 coming up on a holiday and I'm sure people have other things
24 they'd like to do with their families.

25 So we're going to take a lunch break. We've been

1 going hot and heavy. I think with this many people getting
2 served, we'll start in an hour from now. That's -- I just
3 don't think it's practical to do it any other way. We'll go --
4 I know already that we're going to go at least until 6:00
5 o'clock tonight and maybe later. Thank you.

6 **THE CLERK:** All rise.

7 **(Recess taken from 2:16 p.m. to 3:20 p.m.)**

8 **THE COURT:** Please be seated. Mr. Goldberg.

9 **MR. GOLDBERG:** Good afternoon, your Honor, Eric
10 Goldberg for the independent lenders. Before I start, I want
11 to talk a little bit about who the independent lenders are
12 because I think there has been much made of who we are in
13 addition to all the various names ascribed to our group but as
14 we disclosed in the Amended 2019 Statement that we filed, we
15 are very significant creditors at the OPCO bank level. We have
16 \$224 million of that OPCO bank loan as shown on the 2019 and by
17 way of comparison, recall that the OPCO agent recently stated
18 in their reply pleadings -- they made much of the fact that
19 there were joinders and statements in support of the motions
20 filed by Bank of Scotland and by Wells Fargo, each of which
21 holds about 11 percent and the point that they were making was,
22 well, if you take away the lenders that we believe are
23 allegedly conflicted -- Deutsche Bank and JP Morgan -- that
24 still shows about \$200 million or 22 percent of the OPCO loan
25 that is in favor of that deal.

1 Well, if that's a meaningful metric, then our metric
2 is just as meaningful showing we have about 224 million, 25
3 percent of that OPCO loan that is opposed to this current deal
4 and it also means something in connection with one of the
5 arguments that the Debtors have made in support of what they
6 call the plan facilitation motions is that they have made the
7 argument that this is somewhat of a pathway toward a consensual
8 deal. We've got the OPCO lenders. Now we have the PROPCO
9 lenders but you don't. We don't have the OPCO lenders on board
10 this deal yet for a consensual plan because the numbers don't
11 work.

12 Mr. Qusba has acknowledged that the group of lenders
13 that as signed on to the restructured support agreement is 60
14 percent. Sixty percent doesn't do it. We're at 25 percent.
15 Somewhere in the middle is where the rubber hits the road with
16 regard to acceptance for confirmation purposes but also with
17 regard to numerosity which has not previously been focused on.
18 We believe we're there and that we have a numerosity blocking
19 position. Things can still happen but we want to say those are
20 the numbers that need to be put in context about who the
21 independent lenders are, how we fit into this context today and
22 then also the fact that this is not the end of the road. We
23 still have plenty of things ahead of us with regard to a plan
24 and this doesn't solve all those problems that are in front of
25 us.

1 So just -- with that out of the way then, I want to
2 start -- and I'm going to try not to run over what my
3 colleagues Ms. Steingart and Mr. Winston were discussing
4 earlier today. And I want to start off with a quotation and
5 this is from a case called *Ira Halpt (phonetic) and Company* and
6 almost 50 years ago Judge Friendly sitting in the Second Court
7 of Appeals gave everybody, judges, clients, Counsel some words
8 to live by in bankruptcy cases and what he said was, "The
9 conduct of bankruptcy proceedings not only should be right but
10 should seem right" and unfortunately here that principle seems
11 to have been forgotten.

12 What's happening now in this case we just don't
13 believe is right and it certainly doesn't, at least to us, seem
14 right and individually perhaps each issue that we've raised
15 today -- and we have raised a lot of them -- may not be
16 dispositive with regard to what decisions your Honor is going
17 to make today but when presented together in the context in
18 which this case has been conducted from the petition date to
19 the current date -- when presented together as they are in the
20 bidding procedures motion, the master lease compromise
21 amendment, the restructured support agreement, all of these
22 plan dispositive motions as well as -- that are taking place
23 before the Court well in advance of the disclosure statements
24 having been approved and indeed even before one is now on file,
25 make it clear that this is not an accident the way that things

1 have been presented and the way that we've going piecemeal step
2 by step incrementally toward a creeping plan.

3 We think this is not an accident and that deliberate
4 efforts here are being made in contravention of what Judge
5 Friendly's advice to those parties in bankruptcy cases was, to
6 both make sure that things are, in fact, right and that they
7 seem right. Well, what then are we talking about here? What
8 is it that we think is not right in this case? And I'm going
9 to talk about each of these in turn and they are, first, the
10 process and tactics used by the Debtors and the proponents of
11 these motions. Second item is the number and severity of
12 conflicts of interest involved in the case and the third is the
13 concept of fiduciary duty which we think has to a great extent
14 been ignored or abdicated by the Debtors here.

15 And our concern is that with multiple parties,
16 multiple Counsels, negotiations taking place between lenders
17 over which insiders are going to team with which lenders to buy
18 the assets from the estate, in the midst of all this there is
19 no single party. There is no real fiduciary whose job it is to
20 protect the interests of our clients, the creditors of OPCO
21 alone. There's parties who are representing creditors that
22 have cross-holdings. There are parties representing creditors
23 who are also bidders for assets. There are interests of both
24 estates together and how the interest that is being protected
25 is the interest of the unitary whole to prevent loss of jobs

1 and destruction of value that might occur when they're
2 separated and all of those are fine but it doesn't mitigate the
3 fact that absent in all of this is a fiduciary whose job it is
4 to protect the interests of the OPCO creditors who don't have
5 any of those other interests.

6 So the first point with regard to the process and
7 tactics -- I've been involved in many big cases as just about
8 everybody in this room has and by my standard, I think this
9 case is very unique and I have not seen -- and comments to this
10 effect were made by committee Counsel as well. I have not seen
11 a situation that is equivalent to this in terms of the Debtor's
12 unwillingness to share information with other creditors to
13 bring creditors into the process. Just about everything that's
14 happened in this case we find out about it when it hits the
15 Docket and not a moment earlier and in essence what we think is
16 happening here and what has happened is that there is a
17 deliberate effort to, in effect, hide the ball from the
18 parties.

19 There's no reason -- as Ms. Steingart said, no reason
20 that any of the motions now before the Court could not and
21 should not have been previewed with the significant parties,
22 certainly the OCC, my clients holding 25 percent of the bank
23 debt. No reason these things could not have been previewed
24 with them, discussed with them, said, hey, here's what we're
25 doing. Do you have any objections before we file it? It

1 hasn't happened and so what we're reduced to, unfortunately, is
2 a game of Whack-A-Mole. You know, a problem comes up and we
3 try and scramble and address as best we can and then as soon as
4 we do that, another issue comes up or the document changes or
5 the motion changes and we're scrambling to address that one and
6 it's a great waste of attorney resources and time and money but
7 it's certainly not a way to get to an effective solution in
8 this case.

9 Examples of the manner in which that has happened, I
10 just mentioned the idea -- or the timing of the motions.
11 Recall that all of these motions were filed without any advance
12 notice to the -- our significant parties on April 7th. We went
13 about them. We tried -- we started putting together our
14 oppositions. Then two days before the oppositions were due,
15 substantial revisions to the master lease compromise agreement,
16 the bidding procedures motion. Then there was a restructuring
17 support agreement filed requested here and on short notice.
18 Again, we had to scramble to address that. No time spent
19 talking, negotiating, trying to solve problems but only having
20 to respond.

21 Again, this happened earlier this week. Further
22 revisions were filed with regard to the master lease compromise
23 agreement and the bidding procedures -- again things we hadn't
24 seen before -- on Tuesday night, only two days before the
25 hearing and in each case we have to scramble to respond to

1 these things instead of trying to engage in a constructive
2 process and prevent -- or come to a consensus on them. And the
3 way this works out is it's been, sort of, a seriatim Whack-A-
4 Mole process for all of us in trying to respond.

5 Examples here, when the motions first were filed --
6 and I'm talking here specifically about the bidding procedures
7 and the master lease compromise agreement -- we reviewed those
8 and several things jumped right out to us as our main problems,
9 first, that no evidence had been presented by the Debtors to
10 support the 35 million-dollar valuation at which the excluded
11 assets were going to be transferred from OPCO to PROPCO and
12 that there had been no evidence submitted in connection with
13 those motions, that the Debtors had engaged in any efforts to
14 shop OPCO before they agreed to accept a stalking horse bid
15 from their Chairman and CEO in conjunction with the banks.

16 So we start discovery, take depositions of multiple
17 witnesses in multiple cities, start reviewing thousands of
18 pages of documents. Then the replies are filed and lo and
19 behold, there's three new witnesses there whose testimony had
20 not been presented as part of the Debtor's case-in-chief and
21 again the story changes. The Whack-A-Mole game continues.
22 With regard to value, we find out, well, the Debtors didn't
23 actually do the valuation but A&M did the valuation work. We
24 also find out for the first time, because it had not been
25 mentioned in any of the moving papers, that something that we

1 need to consider in the context of what the value of the assets
2 is is that there is a dispute about ownership. Again,
3 something new, it was not there in the moving papers. So we
4 have to start dealing with that.

5 Then with regard to marketing and our allegation that
6 the Debtors had not engaged in -- or not provided any evidence
7 that they had engaged in any efforts to shop OPCO, we find out,
8 oh, well, the reason why is that the Debtors didn't actually do
9 that. They outsourced that. They outsourced it to the OPCO
10 agent who ran the process and so then the tide turns and we
11 have to follow those leads down. More discovery, more
12 witnesses, more depositions and we find, as Mr. Winston
13 mentioned, with regard to the dispute, not only was it not in
14 the pleadings -- or the alleged dispute, let's call it. It's
15 not in the disclosure statement. It was not in the Debtor's
16 SEC filings. It's not in the schedules. It, from our
17 perspective, certainly appears as nothing more than a ruse,
18 something that's been manufactured in the opposition pleadings
19 to address our argument as to why there is no evidentiary
20 support for the value at which they propose to transfer the
21 excluded assets.

22 Moving on to the marketing response, there the story
23 again changes a little bit. They say, well, you know, OPCO and
24 Blackstone didn't actually market OPCO either. They spoke to
25 several buyers who -- they spoke to rather several parties who

1 didn't actually -- they didn't reach to them as potential
2 buyers but they reached out to them as possible parties that
3 they may want to seek as managers. So they spoke to them.
4 They also spoke to Boyd which was not really a marketing effort
5 since as we know, Boyd has been trying to knock the door down
6 to make an offer and get in and do due diligence since last
7 year.

8 But tellingly, one of the comments that Mr. Genereau
9 made in his deposition was that, you know, essentially other
10 than contacts with two parties and Boyd, they made no outbound
11 calls and remember, this is not the Debtor. This is the party
12 to whom the Debtor has outsourced the job of soliciting bids
13 for the Debtor's assets and they're not even doing it. So in
14 essence, in response to the charge that there is no evidence in
15 support of the -- in the initial motion that OPCO had been
16 shopped, they say the agent did it but then
17 Mr. Genereau essentially confirmed that they did not. They
18 spoke to a couple of people but really engaged in almost no
19 affirmative marketing efforts.

20 With A&M, similar hide-the-ball despite the fact that
21 it's the Debtor's burden here. The Debtor, not the OPCO agent,
22 has the burden to show the reasonableness of these
23 transactions, both the bidding procedures, the master lease
24 compromise. It's the Debtor's burden to show the
25 reasonableness of both the transactions and how it's purposing

1 to dispose of the excluded assets and not just dispose of the
2 excluded assets but dispose of them -- transfer them to an
3 insider thus invoking a higher standard. All of this is the
4 Debtor's burden but what it comes down to is they say again,
5 well, okay. We outsourced that to the agent and the agent
6 says, well, Blackstone handled this and, well, what did
7 Blackstone say? Blackstone says, well, we hired A&M to do
8 this.

9 And when you get to the bottom of the chain, it turns
10 out, in fact, that as Mr. Caruso testified in his deposition,
11 that's not, in fact, what A&M did. It may have been what
12 Mr. Genereau wanted A&M to do but Mr. Caruso in his deposition
13 was very clear that they did not conduct any type of valuation
14 assuming we set for the moment this idea of indicative value
15 but they did not go through the list of excluded assets and
16 even attempt to put indicative value on all of those items.
17 They took a subset when you group them maybe five or six out of
18 the 17 categories but that's all they did and so, again, the
19 story shifts and we're constantly having to move to get to the
20 bottom of it.

21 With regard to the excluded assets, something that
22 we've been fighting about for quite a long time, ever since
23 these were filed, again more Whack-A-Mole, more story-shifting.
24 As we went through and did more discovery and were given the
25 opportunity that your Honor gave us to conduct discovery of

1 A&M, we found out what we did there that there was no valuation
2 work to support the numbers that they had put in but then just
3 the premise of what it took to be an excluded asset. How did
4 that concept come about and who decided what assets were going
5 to fall into the excluded assets bucket that goes to PROPCO?
6 Well, we found out more about that too and we discussed this a
7 little bit at the first -- or the second trial date in early
8 May.

9 If you recall, Mr. Freel in his declaration -- he
10 described the excluded assets as those -- this is Paragraph 6
11 of his declaration -- excluded assets are those "used
12 exclusively or predominantly in connection with the operation
13 of the PROPCO properties" and we tested him that -- on that.
14 When he was on the stand over there, we went through one of the
15 categories of excluded assets and this is the Wild Wild West
16 package which include the options and some related properties
17 and we went seriatim down the line and there we found out that
18 what was in the declaration was wrong.

19 What Mr. Freel testified to under oath -- and this is
20 at Page 247 of the trial transcript is that the Wild Wild West
21 assets are not used by PROPCO and the other items in that
22 bucket are not used exclusively or predominantly in the
23 operation of the properties, something that was simply wrong
24 and that was in the papers that they presented to the Court as
25 to why the excluded assets came about but then when he was here

1 in front of oath, he told us the truth which was that those
2 assets are not used in the operation -- predominantly or
3 exclusively in the operation of PROPCO properties. It simply
4 wasn't true.

5 It continues on with the player tracking systems.
6 Mr. Genereau in his declaration -- or sorry -- in his
7 deposition, he testified that the customer lists and the
8 customer data were OPCO's crown jewels. He says that on Page
9 83 of his deposition and their SEC filings -- this is the
10 December '09 10-K. I believe it's Exhibit 48. The Debtors
11 valued their customer relationships and their brands alone at
12 over \$40 million. Now, however, when they're trying to
13 transfer those assets or rather justify the transfer of those
14 assets from PROPCO to OPCO where insiders have an interest on
15 both sides -- on both the buyer and the seller's side of the
16 deal, there's a much different story. They rely on the A&M
17 report that not only they didn't prepare but their OPCO
18 lenders, also participants in the stalking horse bid, had
19 prepared that comes to a much lower number, 16 to \$40 million
20 which is included or subsumed within the 35 million-dollar
21 number.

22 More thumbs on the scale when it came to talking
23 about the IT transfer. If you recall when your Honor corrected
24 me earlier on the mistake in my pleading where I referred to
25 Mr. Kreeger's declaration, part of the analysis that both

1 Mr. Kreeger did and A&M adopted had to do with comparing what
2 the cost would be for PROPCO if it did not acquire these IT
3 assets, what is its alternative? Well, one of those
4 alternatives was the replication scenario where PROPCO would
5 have to go out and buy new stuff itself and in his declaration,
6 Paragraph 14, he gave that cost as approximately \$20 million
7 but we tested him on that during his deposition and it turns
8 out that that number was very light.

9 It underestimated the cost that PROPCO would have to
10 incur because it did not include software which he estimated at
11 \$20 million. It did not include what he referred to would be a
12 required army of consultants nor did it include the time that
13 it would take PROPCO to get up to speed and the logistical and
14 financial problem of how to generate an IT staff from nothing.
15 So when they considered as part of the negotiation as to what
16 value to ascribe to the IT that PROPCO is getting, they
17 completely unbalanced the scales because they, in this case,
18 underestimated the cost to PROPCO by over a hundred percent,
19 the \$20 million that Mr. Kreeger used versus -- in his
20 declaration versus the \$40 million plus that comes out in his
21 deposition.

22 So the bottom line here with regard to the first
23 subcategory I've been talking about, the tactics is -- in any
24 big case we all understand there's going to be changes. Things
25 are going to move fast. There's going to be inconsistencies.

1 There will be exigencies that sometimes require that things
2 have to get done at the last minute. You may have to short
3 notice. That's how life works in big cases.

4 Here it happens every time. Every document gets
5 modified. No document gets previewed to the Committee or the
6 independent lenders. Everything happens at the last minute,
7 even up until the hearing and in addition and more
8 substantively, the story changes and the story changes
9 constantly from the creation after the fact when the motions
10 were filed of this dispute as to ownership to changes in the
11 story about who, if anybody, marketed the assets, changes in
12 the story about who valued the assets, changes in the story
13 about what the IT costs would be to PROPCO. Everything changes
14 and it is not a way a case should be conducted. It's certainly
15 not following Judge Friendly's guidance about making sure
16 things not only are right but seem right because the way things
17 have gone tactically in this case is not right.

18 The second issue I want to talk about is conflicts
19 and there are a lot of them in this case. From the ones you
20 knew about on Day 1 with regard to the capital structure, we
21 have separate groups of creditors under both the OPCO and
22 PROPCO stacks. With regard to the next level of complication
23 on conflict is the existence of the master lease magnifies
24 those conflicts by creating a landlord/tenant relationship
25 between OPCO and PROPCO and it's a major one with a 250

1 million-dollar contract rent obligation per year and it
2 matters. It's not the case as it is in many bankruptcies where
3 you might have -- this might all come out in the wash where you
4 have a substantive consolidation where you have the same group
5 of creditors. You don't have that here. You have very
6 different groups of creditors. So the existence of the master
7 lease as we've seen has material differences in how it's going
8 to affect the creditors in the case.

9 The third problem with regard to conflicts is the
10 cross-holdings which further complicate things. In addition to
11 having the two creditor groups, the OPCO and the PROPCO stack,
12 we also have the only two creditors of PROPCO which are
13 Deutsche Bank and JP Morgan also happen to be the largest
14 creditors on the OPCO side. One of those two, Deutsche Bank
15 also happens to be the agent for the OPCO lenders and I know
16 you've heard this before and I know you've heard me harp on
17 conflicts before. So I just want to beg your indulgence a
18 little bit because I'm going to go further because it's not
19 just those three now.

20 Those were the three that really were there when the
21 case commenced and I know what your Honor had to say about the
22 agency issue in the *Chrysler* decision. I've heard it all but
23 also there are many more conflicts now than there were then and
24 the conflicts also are significantly worse and made more
25 complicated by the fact of the motions that are before the

1 Court today. The existence of a stalking horse bidder
2 comprised of the senior officers and directors of OPCO
3 combining with the OPCO agent and the PROPCO lenders to try and
4 acquire the OPCO assets at the same time of the bidding
5 procedures, the transfers contemplated under the master lease
6 compromise agreement and the restructure and support agreement
7 and then layer on top of that the plan and you have almost a
8 law school issue-spotter question of conflicts of interest here
9 and they continue.

10 With regard to the officers, we've all heard the
11 adage, "One cannot serve two masters" or at least not
12 adequately and we think that still is a standard worth
13 listening to. As we've heard before, Mr. Freel, Chief
14 Accounting Officer of OPCO, but he's also an officer of PROPCO.
15 That fact is not in any of his prior declarations. That fact
16 only came out in deposition. With regard to Mr. Haskins, we
17 know he is the General Counsel for OPCO. We also know he's one
18 of the three independent -- or one of the three directors for
19 PROPCO and, in fact, Mr. Haskins is also a signatory for PROPCO
20 on the master lease compromise agreement. At trial May 5th and
21 6th, we saw the board resolution that gave authority to
22 negotiate the master lease compromise and related documents to
23 Mr. Haskins and Mr. Freel. That is Haskins and Freel, who have
24 offered testimony here on behalf of OPCO, were given authority
25 to negotiate those transactions by PROPCO, the party on the

1 other side of the table.

2 And the conflicts of interest continue as you go
3 higher up the chain of command. Recall Mr. Frank Lorenzo is
4 the Chairman and CEO. His brother Lorenzo is the President and
5 Vice Chairman. However, the Fertittas also own Fertitta Gaming
6 whose stated purpose is to invest in the gaming business which
7 also happens to be, of course, the business that we are all
8 creditors of here. The Fertittas are also the 46-percent
9 owners of the stalking horse which is seeking to acquire from
10 the company that they serve as Chairman and Vice Chairman of
11 the OPCO assets in conjunction with the lenders. The Fertittas
12 are also part of the group acquiring the PROPCO assets from the
13 PROPCO lenders.

14 So this is a situation that's obviously fraught with
15 great danger and more than potential conflict, but actual
16 conflict. As an example, one of the cases that we cited in our
17 initial brief, the combined brief that addressed all three
18 motions -- we cited to the *Bieterman* (phonetic) case out of the
19 Southern District and there the Court pointed out the inherent
20 conflict in this type of situation. On the one hand, you have
21 the director and officer whose duty it is to maximize the value
22 for the estate, to get when selling assets the highest price
23 for those assets but here and as was the case in *Bieterman*, you
24 also have a buyer. Well, the buyer's interest is directly
25 contrary. The interest of buyer is paying as little as

1 possible for the assets that your other half tells you you have
2 to get the most for. So again you cannot serve two masters but
3 that is the position that all of these people are in, both the
4 directors and the officers.

5 Now, at the hearing on May 5th, the Debtors argued --
6 and I believe it was Mr. Kreller when he made the point that,
7 well, there's no requirement that the Fertittas abstain from
8 negotiations or discussions regarding issues in which they have
9 an interest and he also said, this is a practical issue. These
10 are corporate entities. Corporate entities can only act
11 through their board of directors and if you took them out, you
12 no longer have a quorum. So there could be no action. Well,
13 it's a false dichotomy because first of all, we're not saying
14 OPCO and PROPCO shouldn't have officers -- more particularly
15 OPCO at issue. We're saying they shouldn't have these
16 officers.

17 Who do Frank and Lorenzo Fertitta represent on the
18 board? We've been arguing about whether the committee is out
19 of the money. I don't think there's anybody in the room who's
20 going to argue that equity is out of the money. So who are
21 they representing on that board of directors? Why are they
22 still sitting there? Why haven't they been replaced by
23 independent directors? They are simply there representing the
24 dead hand of the out-of-the-money equity and in that capacity
25 as we've seen undisputed testimony, they vote on every issue

1 including those issues that affect them. It's not right. It
2 doesn't even seem right.

3 The conflicts continue with the advisors. Despite
4 all the conflicts of the President and the directors and the
5 officers and the creditors, the fact is that PROPCO and OPCO
6 share advisors and interestingly, PROPCO has separate Counsel
7 in Gibson, Dunn & Crutcher so that on conflicted matters, they
8 have the -- PROPCO has the benefit of Gibson Dunn's advice.
9 There is no separate Counsel for OPCO. OPCO has as its Counsel
10 Milbank. There's no conflicts Counsel for OPCO on that side.
11 It's all Milbank. Milbank not only represents OPCO and PROPCO
12 simultaneously but the testimony has also shown that it
13 represents Fertitta Gaming. It's represented other Fertitta
14 entities, all of which were in the disclosures and the
15 documents submitted at the first hearing.

16 So there's just too many relationships here. How can
17 they possibly effectively represent OPCO when they're also
18 representing PROPCO? They're also representing the Fertittas
19 and it is really no surprise then that the suggested response
20 to any potential dispute is settle. Make a global settlement,
21 master compromise agreement, joint plan, sell to an insider and
22 in all of this, there is nobody representing solely the
23 interests of the OPCO creditors.

24 Lazard, similar problem -- Lazard also simultaneously
25 represents OPCO and PROPCO. Although it's interesting that

1 several of the directors and officers were under the impression
2 that Lazard only represented them. That is, several officers
3 and directors testified that their belief was that Lazard was
4 OPCO's investment banker, not that Lazard represented both OPCO
5 and PROPCO, which is the fact. For example, at trial
6 Mr. Haskins testified that he thought Lazard was OPCO's
7 investment banker. That's at 85 and 86 of the trial
8 transcript.

9 Mr. Nave -- or Dr. Nave in his deposition testified
10 -- this is at Pages 145 and 146 -- that he believed Lazard was
11 his investment banker. So the question then, would they have
12 regarded the advice that they received from Lazard differently
13 if they knew what the facts were, that is, if they knew that
14 Lazard wasn't their investment banker. That is, wasn't the
15 investment banker just for OPCO, the seller of the excluded
16 assets? But in fact, Lazard also was the investment banker for
17 PROPCO, the buyer of the excluded assets and an even bigger
18 question is why didn't they know that. Why didn't the
19 independent director of OPCO know who Lazard represented? Why
20 didn't he ask before relying on his advice?

21 There's also another conflict with regard to Lazard.
22 As joint financial advisor for OPCO and PROPCO, it stands to
23 get a 12-and-a-half-million-dollar success fee. Now, it
24 doesn't get more if the OPCO assets are sold for more. It
25 doesn't get more if there's better terms of a restructuring

1 negotiated for OPCO. It gets a flat 12 and a half million
2 dollars although it has another disincentive to keep
3 negotiating to get a better deal for OPCO in that the way that
4 fee works is that the 12 and a half million dollars gets
5 reduced by the monthly advisory fees that Lazard gets. I
6 believe it's \$350,000 a month. So their incentive is to get it
7 done, not necessarily to get the best deal done for OPCO.

8 Mr. Aronson highlighted this conflict better than I
9 could when in his deposition we were discussing the issue of
10 the 35 million-dollar number for the excluded assets and we
11 were talking about the negotiation on this point between the
12 OPCO lenders and the PROPCO lenders and keep in mind, we
13 weren't talking about a negotiation between OPCO and PROPCO
14 because that didn't happen. This is a negotiation between two
15 lender groups, neither of which is the Debtor, neither of which
16 has a fiduciary duty to any of the creditors in this case but
17 the question put to Mr. Aronson was this. "Was OPCO, as far as
18 you know, independently advised during that negotiation?"

19 Mr. Aronson asked me a clarifying question, "OPCO
20 lenders or OPCO company?" And I clarified, "OPCO company."
21 And Mr. Aronson's answer -- and this is at, I believe Page 100,
22 Lines 12 through 25 of Mr. Aronson's deposition. He says,
23 "OPCO company was in that discussion to try to
24 facilitate a transaction. Whether that transaction
25 was going to be with Fertitta Gaming or Boyd, the

1 OPCO estate at the end of the day didn't really
2 matter. We wanted to get on with the process." The
3 OPCO estate didn't matter is what the OPCO estate's financial
4 advisor testified to.

5 The last conflict point, plan and the leases and at
6 this point I think we all recognize that there's going to be a
7 divorce and whether it's going to be amicable or ugly remains
8 to be seen and the question then is on what terms. Well, the
9 Debtors have filed a joint plan and, again, it's unclear why
10 that's necessary given the imminent nature of the divorce.
11 Well, then the sensible thing at least to us seemed to be,
12 well, have separate plans. We don't have an issue, your Honor,
13 to clarify, I think, some comments you made earlier of tying
14 the sale of OPCO to a plan. That makes sense but that's not
15 quite what they're doing. They're doing more than that.

16 The sale here is not tied to a plan, meaning a plan
17 for OPCO. It's not tied to a plan for OPCO and PROPCO even.
18 The sale is made contingent on this plan. This plan is the
19 joint plan. The joint plan provides for releases to be given
20 to OPCO -- to the officers and directors, including those who
21 voted on this decision, including on those who participated in
22 the decision in the 2007 LBO. So that is another conflict and
23 Mr. Nave somewhat troublingly testified during his deposition
24 that he was aware of the release issue but he didn't at all
25 consider it a conflict, didn't think that it was conflict to be

1 voting as a board member to approve bid procedures that tied
2 the ability to close the sale of OPCO -- that tied that upon
3 the confirmation of a plan of reorganization that gave him and
4 his fellow directors a release. He didn't think there was a
5 problem with that at all.

6 So again on the conflicts, there's always going to be
7 a conflict in a multidebtor case. It's hard to avoid and you
8 deal with it as best you can. Here, there are way too many
9 conflicts. There are more conflicts than I've ever seen in a
10 case, conflicts among the principals acting and their advisors.
11 There's just too many. It's not right and it doesn't certainly
12 seem right.

13 The next issue I want to talk about is fiduciary duty
14 and the concept of fiduciary duty is one that's always
15 important in a bankruptcy but here it's even more so because of
16 the number and the severity of the conflicts of interest. Now,
17 unfortunately despite the number of professionals and the
18 sophisticated corporate structure, again, the problem is that
19 there is no real fiduciary whose job it is or who's carrying
20 out the job of protecting the interests of the OPCO creditors.

21 Let's talk about who isn't. It's not Milbank.
22 They're representing OPCO and PROPCO. They also represent the
23 Fertittas. They also did formation work for FG Gaming. So
24 it's not Milbank. It's not Lazard. Lazard represents OPCO and
25 PROPCO although some of the officers and directors actually

1 weren't sure who Lazard represented. It's not the OPCO board.
2 Let's break it down and see who's on the OPCO board. Well, the
3 Fertittas, they obviously have divergent interests. They're
4 part of the stalking horse. They're owners of FG Gaming.
5 They're not the ones who are going to be carrying out their
6 fiduciary duties to protect the interests of the OPCO
7 creditors.

8 So then who's left? It really comes down to Dr. Nave
9 who is the -- or the Debtors have characterized him the sole
10 independent director of OPCO. Where is Dr. Nave in all this?
11 We have lots of declarations that have been filed in this case,
12 four or five for Mr. Haskins, multiple declarations for
13 Mr. Freel, several declarations for Mr. Aronson. We even have
14 a declaration for Mr. Kors who is the -- one of the two PROPCO
15 independent directors but not a word from Dr. Nave. Why and
16 where are the Debtors hiding him? That was a question we had
17 when we saw the declarations that were filed in connection with
18 the motions and we saw the statements that were made therein.

19 So we took his deposition to find out and this is
20 what we learned. Dr. Nave is a very nice man. He's a hard-
21 working man, a self-made man, a very patriotic man, nothing but
22 the greatest level of admiration for Dr. Nave but the Debtors
23 and Dr. Nave's advisors, I think, failed him. Dr. Nave was not
24 adequately prepared for the key role that he should be playing
25 and, in fact, is required to play in this case. He is the sole

1 independent director of a bankruptcy case involving multiple
2 billions of dollars and he simply -- I'm sure if it had been
3 explained to him, he would understand it and he would work hard
4 to do it but it never happened.

5 In a very telling moment, I asked Dr. Nave during his
6 deposition what his understanding was of the phrase "fiduciary
7 duty." This is at Pages 122 and 123 of his deposition and in
8 essence what he said was that to him, it means working hard,
9 doing the best he can without conflicts and with all due
10 respect, that's good. It's a good start but it's not
11 sufficient. It's not enough. Fiduciary duty means more than
12 that. It means understanding the parties that you have the
13 duty to protect, understanding what those interests are and
14 serving as a zealous guardian of those interests whose duty it
15 is to protect.

16 And unfortunately that's not what he did and I don't
17 think it's out of malice or part of a grand conspiracy but the
18 fact is that is not how Dr. Nave viewed his role. He simply
19 did not understand what his responsibilities were and his
20 testimony is pretty consistent on that point. As a threshold
21 matter, we asked Mr. Aronson about Dr. Nave and he told us that
22 Nave always voted with Frank Fertitta when he was -- when he,
23 Aronson, was present at board of directors' meetings. That's
24 Page 95 of Mr. Aronson's deposition.

25 Then in the context of the motions that were before

1 the Court, Mr. Nave testified repeatedly that he viewed his
2 role as that of a facilitator, someone whose job it was to get
3 a deal done, not necessarily someone whose job it was to
4 protect the interests of the creditors for whom he served as a
5 fiduciary, the OPCO creditors. Examples, in connection with
6 the discussion during his deposition of the stalking horse bid
7 at Pages 64 to 65, he was asked whether OPCO was involved in
8 the negotiation of the stalking horse bid. Dr. Nave said, "I
9 had nothing to do with that." The negotiation of the stalking
10 horse bid -- the sole independent director of the company being
11 sold had nothing to do with that.

12 On Page 73 in the context of a discussion about the
13 excluded assets, Dr. Nave testified, "My understanding is that
14 that was a negotiation between the OPCO lenders and the PROPCO
15 lenders." He also said, "All that OPCO did in that connection
16 was to facilitate that." In connection with the master lease
17 compromise agreement on Pages 103 to 104, he testified that he
18 was not personally involved in any negotiations with the PROPCO
19 lenders regarding a master lease compromise. At 152, he told
20 us he never even met Mr. Kors. The independent director for
21 PROPCO never even met the other independent director. On 164,
22 he testified he never had a discussion with anybody from
23 PROPCO. So a facilitator is not a fiduciary and certainly from
24 the testimony adduced from Dr. Nave, Dr. Nave was not acting as
25 a fiduciary for the OPCO creditors.

1 And he was not the only problem here. Mr. Genereau
2 during his deposition confirmed how this process worked, that
3 motions that we've ended up with today are not the product of a
4 process negotiated vigorously by fiduciaries protecting their
5 interests. Rather with regard to these negotiations,
6 Mr. Genereau testified that in the context of the master lease
7 compromise and the excluded assets that the OPCO lenders led
8 the negotiations, that while although OPCO representatives
9 Freel and Haskins were present, Dr. Nave was not.

10 On Page 140, Mr. Genereau confirmed that the OPCO
11 lenders selected the stalking horse, not OPCO, not Dr. Nave.
12 The OPCO lenders selected the stalking horse and then I asked
13 the question, "Well, did you ever -- did OPCO ever question
14 your decision -- the lender's decision? Did it ever say we're
15 not going to follow that decision?" "Not to my knowledge" was
16 the answer.

17 This same concept of parties who should be
18 fiduciaries acting as brokers or facilitators was confirmed by
19 Mr. Freel. On Page 12 of his deposition, he describes his role
20 again as a facilitator between the OPCO lenders and the PROPCO
21 lenders. He even confirms on Page 21, he never even spoke to
22 Boyd, one of the parties who was negotiating supposedly to
23 become a bidder.

24 On Page 48 of his deposition when we were talking
25 about the bid procedures and the excluded assets, the question

1 I asked was, "Who represented OPCO in those discussions?"
2 Answer, "I don't know. I was not involved." This is the
3 officer of OPCO who's testified and submitted his declaration
4 in support of the bid procedures.

5 Similar story with regard to Mr. Haskins -- at Page
6 40 of his deposition, he described his role as a facilitator
7 and at Pages 90 through 92 with regard to the Texas put and the
8 excluded assets said that "Those concepts were negotiated
9 between lenders."

10 On the PROPCO side, a similar story happening there
11 -- when we asked about his interactions with PROPCO, he
12 testified on Pages 57 through 58. We asked who interacts with
13 OPCO. His answer was, "I'm not in that loop." He didn't know
14 who was in the loop. Pages 98 through 100, he confirms that
15 the negotiations were between the banks, he was told. He
16 doesn't know because he certainly wasn't involved.

17 So thus the bottom line here with all this, your
18 Honor, is that the Debtor's witnesses are consistent, that they
19 did not act as representatives of the OPCO creditors. They
20 did not act as fiduciaries. Rather, they were in these
21 situations acting as facilitators with the goal not of
22 protecting the interest of the OPCO lenders but rather the goal
23 of getting the deal done and that is not what a fiduciary does.
24 Essentially what happened here is that the parties at OPCO with
25 fiduciary duties to the OPCO creditors basically delegated or

1 outsourced those duties to the OPCO lenders and then just did
2 their best and from all the testimony, they certainly worked
3 hard in trying to get a deal done but they had to do more than
4 that.

5 Certainly Dr. Nave as the sole independent director
6 had to do more than that and he did not and the reason why it
7 matters is that all of these problems, the conflicts, the
8 abdication of fiduciary duty create a flawed process and from a
9 flawed process, you're not going to get anything better than a
10 flawed product which is what we believe has been achieved here.

11 The abdication of fiduciary duty further manifested
12 itself in a couple of more particular instances. First with
13 regard to the Texas put, recall that the problem here is that
14 the landlord under this lease is Mrs. Fertitta who is the
15 mother of Frank and Lorenzo, the Chairman and Vice Chairman who
16 are also part of the stalking horse bid and the lease provides
17 that upon a change in control, the landlord has the right to
18 put its interest to the tenant. So the key factor here, the
19 way the put works, is it's at the fair market value.

20 So the question -- the first question at least in my
21 mind was, well, what's the value of the property and you asked
22 some questions earlier about this when we were talking about, I
23 think, the back-and-forth on the numbers and the issue, I
24 think, in that colloquy was, well, it's clear there was a
25 negotiation and whether it's hearsay or not, if it -- you know,

1 a hundred and twenty-five and 50 -- if that was the bid and the
2 asked, clearly there was a negotiation. We ended up at 75.

3 Well, that's not enough. That's what a fiduciary is
4 supposed to do. You don't just start, you know, bargaining
5 like you're in a carpet bazaar about a lower number than
6 somebody has put on the table. If we were having a negotiation
7 about what's the -- you know, the fair price for that Nissan
8 that was left running in the parking earlier, it's not enough
9 for you to say 15 and I come back with five and we horse-trade
10 for a while and come to ten. That's not enough. As a
11 fiduciary, my job would be to try and get all the information I
12 need to conduct that negotiation in an intelligent manner.
13 There's got to be some outside absolute references. In the
14 case of the car, certainly you'd want to know what's the Blue
15 Book value of that car, what are the costs but there's evidence
16 that anybody ever did that with regard to the value of the
17 property subject of the put.

18 Putting aside the issues about the legal trigger
19 whether it is a change of control, whether you can get around
20 it in a Texas Station bankruptcy, there's been no testimony
21 that anybody ever even undertook that first step to say, well,
22 what is the property worth because maybe you'd find out that
23 even at the bottom end, you know -- because, you know, there's
24 just no basis for that support. You can argue all day long but
25 if there's some outside piece of information that tells you

1 that the other guy's position is completely out of the money,
2 you are not doing your job as a fiduciary and that's what
3 happened here.

4 These negotiations were between lenders. That was
5 confirmed by all the parties whose depositions we took but the
6 lenders are conflicted. They're buyers and sellers and the
7 buyers, the people who get the benefit of a lower price, are
8 all in the stalking horse bid. There's simply, again, nobody
9 protecting the interests of the OPCO creditors. Ms. Steingart
10 made the point this can -- you know, maybe this is a great deal
11 but we don't know that. There's no evidence about that. So
12 how then can we approve all these transactions when it may well
13 be that this 75 million-dollar number which, by the way, is
14 supposed to be subject to documentation that as far as we know
15 has not -- certainly not been put on the record, let alone
16 completed.

17 **THE COURT:** That documentation would have been some
18 type of binding agreement by the lessor which so far as I can
19 determine hasn't come into existence.

20 **MR. GOLDBERG:** Exactly right. Exactly right. So it
21 may well be that the 75 million-dollar number is the worst kind
22 of poison pill, that nobody views that property as having a
23 market value in the neighborhood. So all this effectively does
24 is chill bidding, discourage people from bidding on PROPCO --
25 or OPCO because they know that there's a 75 million-dollar

1 number that's attributed to the Texas Station put.

2 Another example, it's what I call the A&M Daisy
3 Chain. Now, from the first day that these motions were filed,
4 I made to the point -- the point to your Honor that our concern
5 was value. What basis is there for the Court to determine that
6 the 35 million-dollar number is a reasonable number? Where is
7 evidence that supports that number? And really all that there
8 is -- and we don't think it's much but all that there is the
9 fact that people have testified there were negotiations and
10 there's an A&M report but as Mr. Winston did a very thorough
11 job of explaining, the A&M report doesn't address most of the
12 excluded assets. At best, it hits five or six categories.

13 So how did we get into this position then where OPCO
14 has signed on to an agreement, the key component of which is a
15 35 million-dollar value ascribed to the excluded assets and the
16 only evidence of that \$35 million is -- and we don't think it's
17 good evidence -- was provided by the financial advisor, not the
18 Debtor but the financial advisor to the creditor of the Debtors
19 who is the financial advisor to one of the parties that's on
20 the buying side of that transaction, the OPCO agent.

21 Well, here's how it happened. It started with
22 Mr. Genereau. He testified that -- and this is Page 32 of his
23 deposition -- that A&M's mandate was to value the excluded
24 assets. We asked him, you know, whether Blackstone had done
25 that and he said, "No. A&M handled that work" -- Page 20, Line

1 18. Well, Mr. Caruso then turned that around and contradicted
2 it. We said, "Was part of A&M's engagement to provide an
3 indicative value for all of the excluded assets?" His answer,
4 "No" -- Page 17, Line 5 continuing to Page 18, Line 4. So
5 Genereau says A&M's job is to value all the excluded assets.
6 Caruso says no, it was not.

7 Mr. Haskins, he did not understand the A&M report the
8 way A&M did because he testified that he believed that the
9 Steering Committee had retained A&M to value "each and every
10 one of the excluded assets." That's at Page 69 of his
11 deposition. He also understood A&M to have okayed or signed
12 off on the 35 million-dollar number and that's on Page 92 of
13 his deposition. So Haskins never actually saw the report but
14 his understanding was that A&M actually did value all the
15 assets which is, in fact, not -- or exactly the opposite of
16 what Mr. Caruso said. He said, "We didn't do that."

17 Dr. Nave similarly misunderstood what A&M was doing.
18 He never saw the report although it was discussed at a board
19 meeting. His view was that Lazard signed off -- or thought
20 that that number was reasonable but at the time Dr. Nave also
21 thought that Lazard was his financial advisor when, in fact, we
22 know Lazard was the financial advisor for both OPCO and PROPCO.
23 Further, Dr. Nave also testified that he thought the A&M report
24 was only about computers. That's at Page 185 of his
25 deposition.

1 So in this daisy chain, we go from Mr. Genereau
2 saying we hired A&M. And it's significant that the Debtors
3 didn't hire A&M. This is the lender's advisor but Genereau
4 says, we hired A&M to value all the assets. Haskins said, "I
5 thought A&M was valuing each and every asset." Caruso says,
6 no, no, no, we did not value all the assets." At the end of
7 the day, where do we end up with Dr. Nave the sole independent
8 director believing that his banker Lazard had blessed the
9 report but had only dealt with a very tiny subset of the
10 excluded assets and nevertheless the board authorized this
11 transaction that apparently nobody had any understanding, any
12 idea of what the A&M report actually did or said.

13 And the bottom line here on the fiduciary duty again,
14 your Honor, is a flawed process. It can only lead to a flawed
15 result. We think that's what happened here. Simply, there's
16 an insufficient basis for the Court to approve the transactions
17 of the magnitude that have been proposed here, transfer of the
18 excluded assets, bid procedures that provide for an auction of
19 not all of OPCO but most of OPCO and very significantly provide
20 for a very key subset of OPCO assets to be kept off the market,
21 to be excluded assets. So all in, your Honor, in Judge
22 Friendly's words, this is not right and it doesn't even seem
23 right.

24 I want to add a few things, if I may, to try and
25 address some comments that your Honor made with regard to -- in

1 the presentations of Mr. Winston and Ms. Steingart. With
2 regard to the A&M report and the issue that valuing the Tiverti
3 (phonetic) options and the Wild Wild West options -- to be real
4 clear with what our position is, A&M also was very clear that
5 they did not value the options. What they did was determine
6 whether it made sense that then -- at current prices to
7 exercise the option but a key component to the value of any
8 option, your Honor, is the optionality, the fact that it gives
9 you a right to acquire an asset at a fixed point in time.

10 So -- and you'll see -- if you'll look up in the
11 stock tables -- if you look for, you know, any out-of-the-money
12 option, it doesn't trade at zero. It trades at some value
13 because you are locking in a price and, you know, in effect
14 obviating any market changes. So we don't know whether that
15 value might be -- we have no idea because nobody has testified
16 to it but the point I was trying to make with regard to A&M is
17 they didn't value the option. There is some value to the
18 option but what he did was simply to -- Caruso did was simply
19 determine whether it made sense to exercise that today. It
20 doesn't if those numbers are right but we also pointed out that
21 they ignored some land values that they didn't like in the
22 article that was being discussed with Mr. Winston before.

23 With regard to a colloquy that you had with
24 Ms. Steingart about tying the plan to the sale and you said,
25 "This is a good thing because by tying the closing of the sale

1 to the plan, I have effectively incorporated into the sale
2 process all the protections that are built into the
3 confirmation process" and that's a good thing and I agree and
4 that's why I think that in most cases a sale tied to a plan is
5 a good thing but, again, the problem here is that this is more
6 than that. What these bid procedures say is that the sale is
7 tied to this plan, this plan that has the releases. Those
8 releases that we think are violative of Ninth Circuit law.

9 So look at it from one sense, you'd say, well, you
10 have all the protection you need there. If those leases and
11 anything else in the plan is invalid, all is okay because that
12 sale won't get approved but the problem is that you don't
13 necessarily know what would have happened. If no other bidders
14 show up -- what if no other bidders show up because they look
15 at those procedures and their lawyer tells them, well, you
16 could put in a bid and you could put in the highest bid and you
17 could make it a blockbuster bid but you don't get to take home
18 your assets unless and until that plan is confirmed.

19 That's a huge overhang and how do we know if the
20 process worked if buyers don't show up because of those
21 provisions? What we have then is a stalking horse. Is that,
22 your Honor, you know, a success or a failure? If they then
23 say, okay, fine, we'll take the releases out of the plan, they
24 win. They win because they have successfully chilled other
25 bids. They get to acquire the assets at the stalking horse

1 bid. It could be viewed as a success because we got rid of the
2 releases but in the bigger picture, it could be viewed also as
3 a failure because we'll never know what would have happened,
4 what bidders didn't show up because they said, you know what, I
5 don't want to get involved in the confirmation process. That's
6 not what I'm into as a buyer. As a 363 buyer, I want to go in,
7 get my assets and come home.

8 **THE COURT:** Mr. Goldberg, I hear that at almost every
9 363 sale without a plan. The buyer doesn't want to be burdened
10 with all the costs and expenses and the time delays in every
11 Chapter 11 and of course 363s become dominant and typically
12 what you have at the end of the day is a liquidating plan with
13 the proceeds from the sale because Courts are convinced that
14 that is, in fact, based upon the economic circumstances of the
15 cases, the best way to maximize the assets. So I hear that all
16 the time. Don't burden us with the plan and I don't know
17 candidly in this case whether that is accurate or not because
18 you're right. This is not a very unique case -- because
19 that's, kind of, redundant. This is a unique case, at least it
20 is in my experience.

21 **MR. GOLDBERG:** I'm hoping it is in mine.

22 **THE COURT:** The issue that I'm concerned about -- one
23 of the issues that I'm concerned about regarding the plan issue
24 is exactly what you've touched on. Is the sale going to be
25 burdened with incidents regarding plan issues that might

1 preclude someone from either participating or making a maximum
2 bid? And if what you've just told me -- if I understand what
3 you just told me -- and it was certainly in the papers earlier
4 -- that you did not think it was appropriate to tie this sale
5 to plan confirmation because it might chill the sale somehow --
6 at least I thought that's what you were telling me a few months
7 ago.

8 **MR. GOLDBERG:** Yes. The requirement that it be tied
9 not necessarily to a plan -- an OPCO plan, that could make
10 sense but a joint plan and a joint plan that includes --

11 **THE COURT:** So it's just this plan you object to?

12 **MR. GOLDBERG:** It's the tie to this plan with
13 releases.

14 **THE COURT:** I want to make sure I understand our
15 position.

16 **MR. GOLDBERG:** Yes.

17 **THE COURT:** All right. Because buyers in this case
18 -- at least at this stage of the proceedings if there is a
19 sale, it will be part of a plan process.

20 **MR. GOLDBERG:** And I think a fix for that would be to
21 say, let's make -- it should be a buyer's choice issue. The
22 buyer should have the ability to say, I will pay X in a
23 straight up 363 sale but if -- you know, we can also entertain
24 bids where the sale is tied to a plan for OPCO but --

25 **THE COURT:** That gets a little --

1 **MR. GOLDBERG:** It does but --

2 **THE COURT:** I have a very difficult time being able
3 to conceive of an ability to conduct an auction that I could
4 make sure that the bids are -- were equal, in other words, that
5 Bidder 1 would be bidding on a certain sale, Bidder 2 on
6 another sale, Bidder 3 on a third version of a sale and then it
7 becomes extraordinarily difficult --

8 **MR. GOLDBERG:** I --

9 **THE COURT:** -- in being able to measure what would be
10 the highest and the best offer that would maximize and moreover
11 I don't know how -- I find it difficult to imagine how you
12 would advise your client if your client was one of the bidders
13 on how to bid or what you're even bidding for.

14 **MR. GOLDBERG:** I appreciate --

15 **THE COURT:** So I think you begin to slice this thing
16 up --

17 **MR. GOLDBERG:** I agree, your Honor.

18 **THE COURT:** -- and the bidding procedures do provide
19 that any bidder can buy some or all of these assets.

20 **MR. GOLDBERG:** That's correct but --

21 **THE COURT:** So that's already there.

22 **MR. GOLDBERG:** -- the real objection that we have
23 here, your Honor, is the tie to this plan, the tie with the
24 releases.

25 **THE COURT:** I understand that. I understand that.

1 **MR. GOLDBERG:** Okay. And lastly, I -- you know, I
2 realize I've gone way over my time limit and I apologize but I
3 wanted to be clear. I didn't come just with problems. I tried
4 to bring a couple of solutions up here with regard to some
5 other fixes for the bid procedures. The first, I think, is
6 that one issue that hasn't been addressed by the clarifications
7 as to the role of Dr. Nave is the issue of communication. I
8 think a concern that buyers may well have is that they are
9 concerned that if -- about who they can talk to and that if the
10 Fertittas as board members and significant players in OPCO are
11 involved and know what discussions are taking place about the
12 bids that that will chill the bidding.

13 So what I would request is that to the extent that
14 there are parties that do come in and want to have discussions
15 and make bids that the parties on the OPCO side -- and that
16 would include Dr. Nave -- you know, observe strict requirements
17 of confidentiality and moreover that representatives of the
18 stalking horse bidder cannot be involved in those discussions
19 because it's certainly not going to be helpful and it may not
20 only chill bidding but eliminate competitive bidding if
21 somebody knows --

22 **THE COURT:** I assumed that that was the premise upon
23 which Dr. Nave was selected to do this and that would
24 certainly --

25 **MR. GOLDBERG:** I would hope so but it's not explicit.

1 **THE COURT:** I understand. That would certainly be
2 the premise upon which I would go forward if I go forward.

3 **MR. GOLDBERG:** Okay. And that's terrific. And then
4 with regard to the excluded assets problem and I recognize it's
5 a huge problem without an easy solution. One -- and our
6 concern that I think we've stated a number of times is that we
7 have no confidence in this 35 million-dollar number and as
8 Ms. Steingart said, part of this may go away if we had more
9 confidence in the process. If we thought that this was a
10 vigorous process with representatives adequately representing
11 the --

12 **THE COURT:** You mean the prior process?

13 **MR. GOLDBERG:** Well, the process that -- yeah, going
14 forward or, you know, if the prior process --

15 **THE COURT:** The -- as I think Mr. Genereau described
16 it, the one-market test that's already happened, the
17 negotiations have already occurred.

18 **MR. GOLDBERG:** Right. And his -- market tests are
19 great and they may as well -- then let's -- are we having a
20 market test for the excluded assets? No.

21 **THE COURT:** You already know the answer. I think
22 that's about here on Page -- well, I think it's --

23 **MR. GOLDBERG:** Right. And I think there's a way
24 to --

25 **THE COURT:** -- 240 -- 177 or 240 except I didn't get

1 the --

2 **MR. GOLDBERG:** I think there's a way to do that and
3 it's this. The first master lease compromise already has what
4 OPCO and PROPCO negotiated last fall was what PROPCO needed to
5 prevent the -- you know, the calamitous separation in the event
6 of a rejection. They've already negotiated. You've already
7 approved what they need and really what's in the excluded
8 assets now is what they want.

9 These are things that weren't in part of the prior
10 negotiation I think primarily because at that point the
11 Fertittas hadn't committed to buy in on the PROPCO side,
12 certainly not buy in on the OPCO side and I think there's a way
13 to market-test that and it's -- these are called multi-lot
14 auction and it's complicated but it's doable and you solicit
15 bids and you say there are three -- there's going to be, in
16 effect, three things that we're soliciting bids for, the OPCO
17 only assets or the included assets just the way that we have
18 it, the included assets and the excluded assets and a separate
19 auction for the excluded assets and that way we avoid any
20 problems, any disputes about what the excluded assets are worth
21 because they can pay for them.

22 They can put money on the table to say what they're
23 willing to pay for those excluded assets. That will determine
24 what the real value is and if there's buyers out there who want
25 the excluded assets, they can incorporate that into their bid.

1 They'll say, I'm bidding on included and excluded. If there's
2 buyers who just want the included assets, you know, a local
3 strategic buyer, they can do that and PROPCO can put in a bid
4 for the excluded assets and then you just simply determine
5 which has the best value for the estate. Is the estate of OPCO
6 getting more money by selling them as a package or breaking
7 them up?

8 Obviously a lot harder in reality to do but in my
9 view, it's really the only fair way. It's the only fair way of
10 determining whether OPCO gets fair value and determining what
11 the -- you know, how you can do a market test for the excluded
12 assets because I think anything short of that -- by never
13 exposing the excluded assets to a market test, we'll never know
14 whether OPCO is getting fair value for them. Thank you, your
15 Honor.

16 **MR. QUSBA:** Good afternoon, your Honor. Sandy Qusba,
17 Simpson Thacher & Bartlett, Counsel for the Administrative
18 Agent for the OPCO bank facility. Your Honor, does this
19 settlement fall within the range of reasonableness? And I want
20 to focus at the beginning at least on the interest of creditors
21 being of paramount of importance.

22 **THE COURT:** Let me just say that I did read the case
23 that you cited ...

24 **MR. QUSBA:** Okay. Let's start with who the creditors
25 are, who's supporting and who's not. Your Honor, you've heard

1 that the Steering Committee is on board with this transaction.
2 The Steering Committee is comprised of Deutsche Bank obviously
3 as the Administrative Agent, JP Morgan Chase. You have
4 Wells/Wachovia and Bank of Scotland as the four Steering
5 Committee members and they collectively hold 60 percent of the
6 bank debt, approximately \$530 million, roughly.

7 I want to focus a bit on Wells Wachovia/ -- and Bank
8 of Scotland in particular. They have each got independent
9 Counsel. They have each filed joinders in connection with the
10 plan facilitation motions. Neither one of them has a single
11 cent of exposure to PROPCO and both of them have been
12 intimately involved in the hand-to-hand combat that we've been
13 engaged in for the last -- well, since December of 2008.

14 Now, let's go over to the PROPCO side. You have over
15 2 and a half billion dollars of PROPCO debt supporting this
16 transaction, \$1.8 billion of mortgage debt held by JPM in
17 German American Capital Corp, an affiliate of Deutsche Bank.
18 You have 675 million in mezzanine debt that's also supporting
19 this and you have a fairly large swap exposure claim at the
20 PROPCO side. I think it's roughly \$75 million. I'm not
21 positive on that number. Overall, you combine the OPCO
22 Steering Committee and the PROPCO SAC, you have over \$3 billion
23 supporting this transaction and the mezzanine debt on the
24 PROPCO stack is not just Deutsche Bank and JPM. There are
25 third-party investors that hold that exposure.

1 Now, your Honor, let's move over to this side of the
2 table. We have the splinters, the independents, the
3 dissidents. They now apparently hold approximately 25 percent
4 of the debt -- of the bank debt. I believe in one of
5 Mr. Goldberg's very recent pleadings he'd identified seven
6 institutions in his group although I think his latest 2019
7 filed on Monday seems to suggest there are six institutions.

8 **MR. UNIDENTIFIED:** Six.

9 **MR. QUSBA:** Six. Two of those institutions, your
10 Honor, are distressed buyers. They bought on the secondary
11 market at far below par prices and are now in the transaction.

12 **THE COURT:** Doesn't matter.

13 **MR. QUSBA:** It does.

14 **THE COURT:** Why?

15 **MR. QUSBA:** Because Mr. Goldberg complains about all
16 the conflicts. He's got new investors in his group that bought
17 into the conflict. Mr. Goldberg spent a lot of time, as did
18 some of the others, on conflicts and conspiracies, Deutsche
19 Bank, JPM. I'll let the Debtors address the conflict
20 allegations made against the Fertittas and others but with
21 respect to Deutsche Bank and JPM, again, both institutions on
22 the OPCO and PROPCO side have separate Counsel. They have
23 separate financial advisors. We on the OPCO side have
24 Blackstone. We have Alvarez and Marsal. On the PROPCO side,
25 they have Miller Buckfire. On the PROPCO side, they're

1 represented by Sidley Austin and Katt Wallager (phonetic).

2 The splinters ignore that we're living in a fishbowl,
3 that any step we take in this case has to be done by a public
4 motion. Any step we take in this case has to be approved by
5 your Honor. They ignore the fact that Wells and Bank of
6 Scotland were intimately involved in the negotiations for the
7 plan facilitation motions and they do not hold any PROPCO
8 exposure. They ignore it but worst of all, your Honor, they
9 ignore their own contractual provisions, our loan documents.

10 And I know Mr. Goldberg came up here and said he
11 remembers the admonitions of *Chrysler* and other remarks made at
12 prior hearings but apparently he doesn't. Your Honor, I'm
13 looking at the OPCO security agreement. I have additional
14 copies if you'd like it or I could just read it into the
15 record. I have copies for you. Do you want them? Sure.

16 **(Pause)**

17 **MS. UNIDENTIFIED:** I'll take it so I don't have to
18 read it (laughter).

19 **MR. QUSBA:** Your Honor, would you like a copy? May I
20 approach?

21 **THE COURT:** You better have it marked.

22 **MR. QUSBA:** I believe this has been submitted in --

23 **THE COURT:** Is it in the depo? Is it in the exhibit
24 book? I didn't see it.

25 **MR. QUSBA:** It has in prior hearings including in the

1 first day of hearings --

2 **THE COURT:** Well, probably -- I know that it's
3 probably been brought before this Court in some pleading
4 probably early on but let's just mark it. Let's have a
5 complete record that we don't have to search for. What's the
6 next in order?

7 **THE CLERK:** Eighty-one, your Honor.

8 **THE COURT:** Is there any objection to this?

9 **MS. UNIDENTIFIED:** No, your Honor.

10 **THE COURT:** Thank you.

11 **MS. UNIDENTIFIED:** I'd like to but I won't.

12 **THE COURT:** I don't know what the basis would be.
13 It's in except I thought I closed the evidence but I'll let
14 them reopen for the purpose of introducing and admitting this
15 exhibit. I really don't want any more.

16 **(Exhibit Number 81 was received in evidence)**

17 **MR. QUSBA:** You won't have any more, not after what I
18 read.

19 **THE COURT:** Well, there comes a point, you know, this
20 -- I don't want to hear about Whack-A-Mole and I -- we've had
21 enough. Okay. The evidentiary portion is concluded now
22 finally. All right, go ahead.

23 **MR. QUSBA:** Your Honor, Page 20, Section 6.16.

24 **THE COURT:** Let me get there, please.

25 **MR. QUSBA:** Sure.

1 **THE COURT:** General authority? I --

2 **MR. QUSBA:** Yes, your Honor.

3 **THE COURT:** Go ahead.

4 **MR. QUSBA:** I'm going to just read two parts of it,
5 the lead-in and then Clause B. "By acceptance of the benefits
6 of this agreement and any other collateral documents,
7 each secured party, which means each lender in the
8 OPCO syndicate, whether or not a signatory hereto
9 shall be deemed irrevocably." Clause B, "To confirm
10 that the administrative Agent shall have the
11 authority to act as the exclusive agent of such
12 secured party for the enforcement of any provisions
13 of this agreement and such other collateral documents
14 against any grantor, the exercise of remedies
15 hereunder or there under in the giving or withholding
16 of any consent or approval hereunder or there under
17 relating to any collateral or any grantor's
18 obligations with respect thereto." Okay. The other
19 provision, your Honor, since this refers to consents hereunder
20 is Section 4.01, Page 13.

21 **THE COURT:** I believe that that section number is the
22 one that I applied earlier on -- in this case. I remember
23 4.10.

24 **MR. QUSBA:** 4.01, Remedies Upon Default, your Honor.

25 **THE COURT:** Zero one, that's --

1 **MR. QUSBA:** "Subject to any" --

2 **THE COURT:** I thought -- I'm not sure it was in this
3 agreement or in the actual creditors agreement.

4 **MR. QUSBA:** I think your Honor referred or cited to
5 the Credit Agreement as well as perhaps the Security Agreement.
6 I'm not positive.

7 **THE COURT:** I know.

8 **MR. QUSBA:** In any event, "Subject to any applicable
9 gaming laws upon the occurrence and during the
10 continuance of an event of default, it is agreed that
11 the Administrative Agent shall have the right to
12 exercise any and all rights afforded to a secured
13 party with respect to the obligations under the UCC
14 or other applicable law." And now *Chrysler*,
15 *Mettledine* (phonetic) and other cases have interpreted this
16 exact language including the reference to applicable law to
17 cover the Bankruptcy Code and in particular 363.

18 **THE COURT:** I'm aware of that. I think I made that
19 record months ago.

20 **MR. QUSBA:** So now with respect to the excluded
21 assets, your Honor, 60 percent of the OPCO banks, much more
22 than what's required under our collateral documents and our
23 Credit Agreement, support the transaction. We can consent to
24 the sale of the excluded assets under 363(f)(2).

25 Your Honor, let me now turn to the Committee --

1 **THE COURT:** You can consent to the sale of the
2 excluded assets because they are all your collateral.

3 **MR. QUSBA:** Exactly, your Honor. Let me now turn to
4 the Committee.

5 **THE COURT:** In other words, when Dr. Nave testified
6 in his deposition, Page 77, that he was satisfied with the way
7 -- he was asked the question.

8 "MS. AXELROD: Do you believe that it would be
9 helpful to have a market test to determine the value
10 of the excluded assets?"

11 "MR. (indiscernible): The question is vague but you
12 can answer it.

13 "THE WITNESS: "I'm very satisfied with the way this
14 was handled. Again, remember, it was negotiated
15 between the two parties that owned the assets, the
16 OPCO lenders and PROPCO lenders." Quote, "owned" it,
17 period.

18 **MR. QUSBA:** That's right.

19 **THE COURT:** Then he continues, "And in a situation
20 like this, I'm sure there's lots of give-and-takes in
21 the negotiating process (indiscernible) negotiated
22 deal for some parts you think maybe (indiscernible)
23 and at the end of the day, they came to an agreement
24 that I believe is, with the knowledge that I have
25 that's been presented to me by a measurement; by

1 that, I mean Tom and Rich Lazard (phonetic), by
2 Milbank and certainly as I've done everything I've
3 sought to (indiscernible) but I believe this process,
4 this end result is good."

5 He apparently believed that the control over the
6 assets rested with you.

7 **MR. QUSBA:** He's a smart man.

8 **THE COURT:** And you're agreeing with that?

9 **MR. QUSBA:** I am agreeing with that.

10 **THE COURT:** Okay. Just so we understand what your
11 position is.

12 **MR. QUSBA:** Yep. Now, let's turn to the Committee.
13 Who is this Committee? The Committee is comprised of only
14 bondholders or indentured trustees as representative of the
15 bondholders. Where do the bonds reside? They reside at
16 Station Casinos, Inc., the Parent company. They do not have
17 any claims, guaranteed or otherwise, against any of the
18 subsidiaries. The OPCO banks, including Mr. Goldberg's
19 clients, do. We have guarantee claims and we have liens on
20 substantially all the assets of OPCO including at the
21 casino/sublevel, at the subsidiary level.

22 So in essence, your Honor, the bonds are like equity
23 because we have structurally senior claims at the subsidiaries
24 and where the value resides. The value in this company resides
25 at the sublevel. You need people to come into the casinos to

1 generate cash, to generate IBITDA and that's the only way it
2 will rise up to the Parent company. So unless that -- those
3 subsidiaries and those casinos, by virtue of their guarantees
4 to the OPCO banks, are able to pay us \$900 million in cash as
5 they contractually promised to do or we accept consensually
6 some other settlement, the bonds shouldn't be getting any
7 recovery. They're equity. We're structurally senior and with
8 respect to a big slug of the bonds, contractually senior
9 because they're subordinated. So, your Honor --

10 **THE COURT:** That wasn't me.

11 **MR. QUSBA:** Oh, okay. So, your Honor, the Committee
12 is out of the money because no one -- no one has come close to
13 offering us \$900 million in cash. Your Honor, if this deal is
14 blown up, we will be mired in litigation and it's an option for
15 the Committee right now. It really is because right now they
16 are out of the money, based on the bids that have come forward.
17 We'll be mired in litigation with respect to ownership, title
18 issues, liens, scope of liens, attachment, perfection issues,
19 Texas Station liability off the table, the master lease
20 rejection, transition, use of cash collateral, potentially
21 lift-stay motions from the PROPCO lenders. I have no idea.

22 Everything will be up for grabs and the Committee,
23 they will simply fight on and no bidder, your Honor, will touch
24 us while we thrash around in this litigation. No bidder will
25 touch us because of the uncertainty as to what it is that they

1 think they're buying or that they could be buying. It
2 certainly won't drive value up with all this litigation going
3 on. Can there be any doubt, your Honor, if these plan
4 facilitation motions are not approved that we will be mired in
5 protracted litigation? Just look at all the lawyers here.
6 Look at all the lawyers that have attended every hearing and
7 almost every issue has been contested.

8 Your Honor, in this --

9 **THE COURT:** So is the choice then that the Court has
10 is approve this because if you don't, the only alternative is
11 some kind of crater chaotic result?

12 **MR. QUSBA:** I wouldn't say it's the only choice but,
13 your Honor, I think I asked Ms. Steingart earlier in the
14 hearing, don't I have to consider what happens if I don't
15 approve the motions.

16 **THE COURT:** Well, I think so. I mean, even if you
17 were to read the opinion that she asked me to read and I did
18 and I did not -- it was usually when I read Judge Walsh's
19 (phonetic) opinion. It's very well thought out but really
20 unremarkable in terms of the legal principles that are applied.
21 He had an unusual case in front of him but the 9019 analysis is
22 consistent with the laws I understand it to be in the Ninth
23 Circuit and that you do. You consider a broad range of factors
24 to try to ensure that a compromise is, in fact, fair and
25 equitable.

1 That's the bottom line and I think you do have to
2 consider -- and I thought I made that clear if I didn't. What
3 would happen in the event that I were to not approve because
4 that has an effect upon creditors as well and, you know, the
5 sense that I get -- maybe I should say this now. It goes back
6 to what I heard months and months ago. Leverage is really the
7 critical issue because I am not comfortable that any party --
8 by that I mean any party, any of the lenders, certainly not the
9 Debtor and I doubt the Committee really wants a result that
10 could lead to a devaluation of these assets in a significant --
11 and it is somewhat -- I look at this that some of you have
12 negotiated as really -- is this really the end of the line
13 because if I heard what I thought I heard from Mr. Goldberg and
14 Mr. Winston, we understand that there has to be a process. We
15 understand that there has to be a sale. We do not like some of
16 the terms of this sale.

17 I think the process itself, the issues that are left
18 to be resolved, I made that -- I'm fairly confident of that.
19 Of course if you start changing some of the details, you have
20 to change the restructuring agreement. I understand that.
21 That's really the plan, in essence. I brought that up
22 (indiscernible) right. So it's really -- as I see it, where is
23 the end of the negotiations? And that puts the Court in a
24 difficult position. That -- it's not a complaint. It's just
25 simply the fact and that position has tried to somehow measure

1 -- balance this all out because values 35 million below could
2 not even -- may not even have that value to OPCO. If PROPCO
3 decides, to heck with you. You can have them all and good luck
4 to you and see what somebody really pays for them other than us
5 -- I don't know what that would be and then I hear Mr. Goldberg
6 say, well, try the multi-lot approach.

7 So I'm getting suggestions on how to do it really
8 trying to, I think -- I won't have me say, I won't approve this
9 but if you do these changes, I might. I don't negotiate.
10 Okay. I've been asked to approve or disapprove what's in front
11 of me and it's not my job necessarily to worry about what the
12 business consequences are but to think that I am going to
13 ignore jobs, ignore financial reality is wrong but to think
14 that I am going to allow -- likewise allow myself to be forced
15 into a corner to accept a deal that may not be the result of a
16 good process, that's not going to happen either.

17 So I'm still weighing this. I don't really disagree
18 with your legal position regarding the independent lenders
19 (indiscernible) but at the same time, the arguments that he has
20 raised I think I need to consider and I will. I just want
21 everybody to understand that. I -- it's really the same thing
22 in a sense that I heard in December. If you don't do this,
23 there's going to be the option of we may have to close down.
24 We don't know what's -- well, fine. You know, if that's what
25 you-all want, that's what you-all may get. That's what the

1 Committee is going to get. I don't know but I really can't
2 worry about that except in light of trying to evaluate what's
3 fair and equitable and what is in the best interest of all the
4 creditors in this case. So I just wanted to put that in
5 context because I really think that's where I'm at.

6 **MR. QUSBA:** Okay.

7 **THE COURT:** If you disagree, tell me because that's
8 really where I think I'm at.

9 **MR. QUSBA:** I'm going to address your concerns with
10 respect to process but before I do, I'm going to give you just
11 a sense -- my sense, at least, of what I think just the
12 professional burn rate consequences will be if we don't -- if
13 we do go backwards and into litigation

14 **THE COURT:** Well, I've looked at fee applications in
15 this case. I have some idea what the financial consequences
16 are.

17 **MR. QUSBA:** My understanding is it's six to \$10
18 million a month and if you extend -- if we extend this case out
19 by even three months -- I know Ms. Steingart suggested four to
20 six weeks. I cannot see how that's possible given the -- all
21 the various issues that will be unraveled if this settlement
22 doesn't get approved. Just three months, that's 18 to \$30
23 million, your Honor. These settlements are designed to avoid
24 costly, uncertain and value-destructive litigation. This --
25 these settlements are creating the framework for the further

1 and final administration of this case through the Chapter 11
2 plan and auction process.

3 Now, let me, your Honor, talk about process because
4 we've been criticized quite a bit. I'll begin, I think, in
5 December of 2009, your Honor. We had just come back from Reno
6 after the initial master lease compromise agreement hearing, a
7 contested hearing -- more evidence of the fact that there is no
8 conspiracy here. PROPCO was on one side. OPCO banks and OPCO
9 itself was on another side. PROPCO wasn't even together with
10 its own company with PROPCO -- the PROPCO lenders, excuse me,
11 weren't on the same side even with PROPCO -- a very contested
12 hearing.

13 We get back to New York and we're in the throes of
14 plan negotiations because your Honor made it quite clear this
15 was a three-month deal, that you would not be happy if we came
16 back and had made no progress and if you had to make decisions,
17 you would make decisions and you just apply the law to the
18 facts and business results be damned.

19 Your Honor, mid to late December Boyd Gaming makes a
20 public bid for approximately \$2.45 billion while we're in the
21 middle of these negotiations. It was a whole company
22 transaction, PROPCO and OPCO. PROPCO didn't want to
23 participate in it. They had their own reasons. So we
24 approached Boyd immediately. We wanted to know, well, how much
25 of that 2.45 are you allocating to us, naturally. We

1 facilitated a confidentiality agreement with the Debtors, two
2 of them, in fact, and Boyd. We wanted to make sure Boyd was
3 real. There were concerns and I'll get more to that in a
4 moment or two, your Honor.

5 We were concerned because Boyd is Station's Number 1
6 competitor. They're a locals player. They have casinos in the
7 same market in the same area. So we were concerned and we
8 wanted to make sure through confirmatory discussions as well as
9 initial diligence whether Boyd was real and genuine with
10 respect to its proposals.

11 **MR. UNIDENTIFIED:** One moment.

12 **MS. STEINGART:** Sorry for interrupting, your Honor.
13 I don't know if this is new evidence that they're putting in a
14 new affidavit. It's not in the record. It's not in the record
15 before the Court. I'm loath to interrupt Mr. Qusba but --

16 **THE COURT:** Where is it in the record?

17 **MR. QUSBA:** Your Honor, what I'm talking about I
18 think Mr. Genereau covered in his deposition with respect to
19 the process.

20 **THE COURT:** There was certainly --

21 **MR. QUSBA:** Mr. Caruso to a lesser extent.

22 **THE COURT:** I know what Mr. Genereau testified to.
23 He testified to some of the issues regarding Boyd. I'll let
24 you argue from that but I'm not accepting this argument as
25 evidence.

1 **MR. QUSBA:** Thank you, your Honor. So that's
2 December of 2009. We go into January of 2010 and we're
3 informed that Fertitta Gaming has been formed and that there
4 was a deal in principle with the PROPCO lenders and Fertitta
5 Gaming. We then appear before your Honor in late January for
6 the standing hearing and immediately after the standing hearing
7 we go to Vegas for meetings. There, your Honor, we leave with
8 a proposal from Fertitta Gaming and PROPCO subject to two big
9 caveats, asset transfers completely open issues still. PROPCO
10 wanted them. We wanted value for them and Texas Station, we
11 wanted that liability solved.

12 In February, your Honor, after making some progress
13 with the PROPCO lenders and Fertitta Gaming, we have a bank
14 call February 11th. Mr. Goldberg was on it. Mr. Goldberg's
15 financial advisor was on it. I believe Mr. Goldberg's clients
16 were on it and we presented three alternatives. We told the
17 banks where we were with Fertitta Gaming and PROPCO. We told
18 them that we were having initial discussions and productive
19 discussions with Boyd and we told them we were even looking at
20 a stand-alone plan where the banks would have to equitize their
21 debt if they didn't find a bidder that was suitable or
22 presented enough value. We also told them that asset transfers
23 were a big issue. We told them that we had engaged Alvarez and
24 Marsal. That's February, mid-February. None of this is a
25 surprise to Mr. Goldberg, your Honor.

1 In March we intensify negotiations with both parties,
2 Boyd and FG PROPCO. With Boyd, we negotiated a support
3 agreement substantially final. We negotiate a plan term sheet,
4 debt term sheets. With PROPCO and FG, we negotiate a credit
5 agreement which is 85 percent done and attached to one of the
6 plan facilitation motions, maybe our support agreement. We
7 hold another bank call, your Honor. We again explain where we
8 are with Boyd and we hear from the banks. Again Mr. Goldberg
9 is on the call. His financial advisor is on the call. His
10 clients are on the call and what do we hear from the banks?
11 Cash is king. Cash is king. Try to get as much cash in our
12 recovery as possible. Debt terms, to the extent we're
13 providing seller financing -- and we are -- get it cash pay.
14 Have it secured by assets that are operating, not just raw land
15 and an auction is a must.

16 We go into April now. We redouble their efforts,
17 shuttle negotiations, FG PROPCO, Boyd. And let me stop there
18 for a moment with respect to Boyd, your Honor. I was involved
19 in 98 percent of the discussions with both sides and in
20 particular with Boyd, I just want the record to be clear, I
21 believe that they are -- they were a good faith participant in
22 those negotiations. They helped us immensely with respect to
23 understanding what were important issues as well as driving up
24 value.

25 In April, your Honor, the Debtors began to file

1 papers. The train is starting to leave the station. The
2 disclosure statement is filed. A plan is filed. A revised
3 master lease compromise agreement is filed and bid procedures
4 are filed for a naked auction for OPCO. We were not on board
5 but what it did, it became the fulcrum to bring us to the
6 essence of the negotiations, the elephant in the room, the
7 asset transfers and Texas Station.

8 The PROPCO lenders, as we got involved in those
9 negotiations, made allegations and continue to allege liens on
10 certain assets. So title became an issue and it was clear that
11 PROPCO always wanted assets from us. It's no secret and we
12 wanted value in return and we wanted Texas Station solved and
13 we wanted to get a stalking horse and we wanted to improve on
14 the bids that we had, the January bid from FG PROPCO as well as
15 the negotiations that we were having with Boyd. It was a
16 competitive process. We consistently argued, your Honor, that
17 we needed to get fair consideration for those assets. OPCO
18 could not be harmed. We needed to resolve Texas Station and
19 get a stalking horse.

20 Now, let's talk about Texas Station because I think
21 there's been a lot of back-and-forth today about it. Texas
22 Station, the casino, leases the ground it sits on from a
23 Fertitta affiliate. The landlord under the lease has a 65-year
24 ground lease. Under the terms of that lease -- under the terms
25 of the ground lease, the landlord can put the lease to Texas

1 Station, the subsidiary when there's a change of control at
2 Station Casinos, Inc. It was obvious to us that there's going
3 to be a change of control at Station Casinos, Inc. There's no
4 doubt about it.

5 Either Fertitta Gaming -- or excuse me. Either the
6 Fertittas will leave and just operate PROPCO and invest in
7 PROPCO if they're not the successful bidder with respect to
8 OPCO and even if they are the successful bidder because of
9 PROPCO's participation in that joint bid, there will be a
10 change of control. There's no doubt about it. Under any
11 circumstance, any scenario, there will be a change of control
12 and if we don't go with the Fertittas or PROPCO or Boyd or
13 anyone else, there will be a change of control because the
14 banks will end up owning OPCO, having to convert their debt
15 into equity.

16 So solving the Texas Station lease liability became
17 very important to us. There was a substantial disagreement
18 with respect to the amount of the liability. The liability is
19 supposed to be at the lowest level. It's supposed to be a
20 discounted cash flow of the remaining lease payments, the
21 lowest level. So a fundamental assumption that people have to
22 agree on is the discount rate and that drives the amount of the
23 liability, a substantial portion of it. There are other
24 factors as well.

25 For example, the rent increases over time under the

1 Texas Station ground lease because the cost of living
2 increases. It's also tied to the consumer price index, a
3 number of assumptions and so there was a lot of disagreement
4 about the amount of the liability. On the high end, the
5 landlord was arguing through its representatives who did attend
6 meetings that the liability was anywhere between a hundred and
7 ten and a hundred and twenty million dollars. I think 115 was
8 a number that's been cited in deposition testimony. We
9 obviously were arguing for a much lower number.

10 Boyd, because we were in, again, shuttle negotiations
11 -- we knew real time what Boyd's position was with respect to
12 the Texas Station ground lease. They didn't want to be a
13 contractual counterparty to the Fertittas. When they buy this,
14 they want to buy it free and clear and unless we had the Texas
15 Station liability fixed, there was uncertainty to their bid and
16 the value deduction that would occur until we did get it fixed.
17 So we went to negotiating the Texas Station ground lease
18 liability and the asset transfers in tandem. It was a natural
19 interconnected negotiation.

20 Your Honor, as we conducted negotiations between the
21 two parties, the Fertitta Gaming/PROPCO bid increased and it
22 became apparent to us that the Boyd transaction would include a
23 substantial amount of risk, closing risk, uncertainty,
24 litigation and what we didn't want to do is pick a stalking
25 horse and then have it potentially disappear because of the

1 litigation associated with getting them into the pole position.
2 Termination of exclusivity, becoming a co-proponent, getting
3 their bid procedures approved, no agreement on excluded assets,
4 those were just some of the issues we faced with Boyd.

5 Meanwhile, FG PROPCO's bid is increasing because they
6 want the asset transfers. We want a stalking horse. We want
7 Texas Station liability solved. And so what we saw, your
8 Honor, over the course of those final stages of the negotiation
9 was a resolution of Texas Station negotiated at \$75 million if
10 a third party purchases OPCO and zero and the waiver of the put
11 if the stalking horse, the proposed stalking horse ultimately
12 is the successful bidder. We also negotiated \$35 million of
13 cash and \$13 million of assumed liabilities associated with the
14 excluded assets but I want to be very clear on that. That is
15 not the value of the assets. We got substantially more, your
16 Honor -- substantially more than 35 million and 13. We got
17 Texas Station resolved.

18 The MLCA, the proposed MLCA before your Honor now,
19 another million and a half rent reduction per month -- amortize
20 that out to the end of the year. Assume emergence on 12/31.
21 That's seven months, another ten and a half million dollars we
22 picked up. We got a stalking horse bid finally with FG PROPCO
23 and that bid from the January proposal to the one we chose
24 increased in total consideration by \$35 million. The currency
25 that we're receiving was dramatically different. We went from

1 \$200 million of cash to 317 guaranteed. We went from \$410
2 million of debt that was cash pay and secured by current
3 operating assets to 430. That was cash pay secured by
4 operating assets and we reduced a hundred-and-twenty-five-
5 million-dollar PIC loan -- which was not cash pay. It was
6 payment in kind -- to \$25 million in the stalking horse bid.

7 We in essence, your Honor, converted the PIC
8 exposure, the ugliest part of the capital structure that we
9 were about to receive, into cash, the highest priority that our
10 banks through a series of bank meetings told us was critical
11 and the most important type of currency. And most importantly,
12 your Honor, we have a path to exit with \$3 billion of debt
13 supporting the transaction.

14 Your Honor, the Committee has made -- and the
15 independent lenders or the splinters obviously have spent a lot
16 of time talking about the excluded assets because I think your
17 Honor put your finger on it early in the hearing that this is
18 what it's about, the excluded assets and the right price for
19 the excluded assets. If the price was higher, I think you
20 asked Ms. Steingart, would you be okay? And that's what this
21 is about. They want the excluded assets to be subject to a
22 market test because by excluding them, so they think, we're
23 depressing values but we are not getting 35 and 13 for the
24 excluded assets.

25 We are getting a lot more, the litany of things that

1 I just went through including the substantial increase in the
2 stalking horse and I don't believe we can proceed to an
3 auction. Certainly we won't proceed with a stalking horse if
4 the excluded assets are kicked out or the MLCA is not approved.
5 Their bid goes away. I don't know where we are and even if we
6 do get to an auction, again, I'm not sure how anybody can bid
7 when people are litigating about whose got what asset and whose
8 got what rights.

9 **THE COURT:** I don't know how a Court can settle
10 something if the ownership has not been resolved. It's the
11 position of the objectors that ownership is not at issue.
12 Ownership was not placed at issue in any pleading until the
13 earliest, I think, April -- probably April 7th and maybe even a
14 week later, that the schedules, the disclosure statement and
15 other pleadings did not reflect ownership. I do think that the
16 lien that PROPCO had has always been before the Court. That
17 was not anything new and so -- in that sense but that lien is
18 not ownership. It would only convert to ownership in the event
19 of foreclosure.

20 So -- but I was also told that the risks of
21 foreclosure were significant. I think Mister (indiscernible)
22 made that very clear to me at one argument at length. So I
23 understand what -- I don't remember the Texas put issue coming
24 before me until the April -- let me check. I think the April
25 16th is the date of the filings. I think that's the first time

1 I became aware of a Texas put. I -- so -- but that -- just
2 because that is when I became aware of them does not
3 necessarily mean that they aren't issues that might not have to
4 be litigated.

5 It's really -- once again, my evaluation of this is
6 that it's -- I'm being urged that these are not real issues and
7 that if I just say "No," they'll go away. That's -- no.
8 That's what I'm being -- strip it away. That's what I'm being
9 told after hours of argument.

10 **MR. QUSBA:** I --

11 **THE COURT:** I may have misunderstood but I'll tell
12 you that's what I heard.

13 **MR. QUSBA:** That's what I heard, your Honor, and the
14 other thing I heard was just wave at the excluded asset issue
15 and we'll just keep moving forward. It's not going to happen.

16 **THE COURT:** I don't know what that means.

17 **MR. QUSBA:** Just take it out of the plan facilitation
18 motions. Have a separate lot auction for it or do something
19 else.

20 **THE COURT:** Well, that was the proposed alternative.
21 Yes, I heard that.

22 **MR. QUSBA:** It all goes to the same thing. We're not
23 going to have any deal here with certainly this stalking horse
24 and we will have issues to resolve.

25 **THE COURT:** And what they're saying is, that's your

1 argument. They're not convinced and I shouldn't be convinced.

2 That's exactly where we're at. Am I wrong?

3 **MR. UNIDENTIFIED:** (indiscernible).

4 **THE COURT:** Okay. I understand. I now understand
5 what's going on. I thought I did a few hours ago but that's --

6 **MS. STEINGART:** Well, if I --

7 **THE COURT:** No, I'm --

8 **MS. STEINGART:** Yes. No, no, no. You do understand
9 that this -- that there's --

10 **THE COURT:** Oh, I know that that's --

11 **MS. STEINGART:** -- gloss on it. That makes it
12 less --

13 **THE COURT:** I understand the gloss. I really do but
14 I don't have time to go back all through it, Ms. Steingart. I
15 really do understand your position.

16 **MR. QUSBA:** So the Committee tries to make a lot of
17 hay, your Honor, out of the Caruso report after trying to
18 exclude it and the independent -- and the splinters do as well.
19 I've got to stop that habit. And they criticize the Caruso
20 report for not looking at various buckets. Again, it's easy to
21 pick and choose discrete issues in a multiparty, extremely
22 complex negotiation that's been going on since December of
23 2008, your Honor.

24 We have a 772 million-dollar bid staring us in the
25 face. I'm sorry, but three patents related to a player-

1 tracking system that you can buy off the shelf, according to
2 the Debtor's witness, isn't going to move the needle. A
3 headquarters lease that's underwater and we're not keeping
4 isn't going to move the needle. A human resource manual as
5 part of the business information package that is being
6 delivered to the PROPCO FG side of the house isn't going to
7 move the needle for us, not to mention the fact we have liens
8 on all this stuff. If we thought it mattered, the value would
9 accrete to us, not to the Creditors Committee. Again, until
10 those subsidiaries and casinos can pay us off in full in cash
11 or we accept something from those subs that we consent to, the
12 Committee shouldn't be getting a return in this case. I'm
13 sorry. This is the capital structure they bought into.

14 I also want to be very clear, your Honor, about --
15 that if this stalking horse proposal doesn't get approved
16 tomorrow by your Honor or if it does get approved and later on
17 blows up and never gets to closing, other than very few
18 discrete issues -- or events, we will be back to Square 1 on
19 transfers. They're not happening. Okay? They are not
20 happening. Assets do not get transferred for \$35 million and
21 13 of assumed liabilities do not happen unless -- again,
22 Mr. Nyhan I think will speak about this -- they do everything
23 they're supposed to do, FG PROPCO, and we can't get to a plan
24 that's confirmed on a crammed-down basis.

25 That's the only event where they actually get the

1 asset transfers. When we get to 35, we rid ourselves of 13 of
2 assumed liabilities and we also negotiated for the benefit of
3 the 75 million-dollar Texas Station liability being locked in
4 for another year but those are the only events. If the deal
5 blows up for any other reason, they don't get the transferred
6 assets, not for 35.

7 Your Honor, I'd be happy to talk about the OPCO
8 support agreement if you want. I think you'd mentioned on the
9 May 4th or May 5th hearing that the support agreement concerned
10 you a bit because you just didn't want to be approving things
11 that you didn't necessarily know or understand.

12 **THE COURT:** I don't want to approve a support
13 agreement and then at plan confirmation be told, I've already
14 approved the plan. Therefore, what's the purpose of this
15 hearing? That's what I don't want to hear.

16 **MR. QUSBA:** Yeah. A couple of things, your Honor --

17 **THE COURT:** That's my fear and I think that's -- I
18 think part of the objectors were tying it all back into the
19 support agreements for showing -- to try to convince me that
20 that is, in fact, what might happen. I thought that was
21 what --

22 **MR. QUSBA:** That's not what will happen, your Honor,
23 at all. The support agreement has a ten-page term sheet
24 attached to it. The plan has yet to be negotiated. I haven't
25 seen a revised plan or a revised disclosure statement.

1 Mr. Goldberg and Ms. Steingart are not alone.

2 **THE COURT:** Well, it's easy for me to --

3 **MR. QUSBA:** They're working on it.

4 **THE COURT:** It's easy for me to protect that and
5 maybe it introduces some uncertainty in the process but if I
6 approve the support agreement -- or actually the -- I
7 understand that it refers to certain matters that have not been
8 concluded. I would not consider it to be binding. In other
9 words, I could revisit it at any time and would intend to do so
10 if necessary at the time of plan confirmation. In other words,
11 okay, I would look at it more as evidence of intent, like one
12 huge LOI as --

13 **MR. QUSBA:** That's all it is.

14 **THE COURT:** -- as opposed to anything else and --

15 **MR. QUSBA:** It's --

16 **THE COURT:** -- I just tell everybody that I can deal
17 with those issues.

18 **MR. QUSBA:** That's all it is, your Honor. It is just
19 one big letter of intent and the intent is to work towards a
20 plan and disclosure statement that effectuates a ten-page term
21 sheet which is now being built out because we just --

22 **THE COURT:** Then why do I have to approve it at all?

23 **MR. QUSBA:** -- finished the asset purchase agreement.

24 **THE COURT:** Why do I have to approve it at all?

25 **MR. QUSBA:** Because the Debtor --

1 **THE COURT:** I think a judge should try to do as --
2 the smallest amount of damage possible.

3 **MR. QUSBA:** This is not damage, your Honor. This is
4 simply authorizing the Debtors to enter into that support
5 agreement. It has fiduciary outs. It has -- all it says is
6 that they will proceed and work towards a plan of
7 reorganization which effectuates a term sheet --

8 **THE COURT:** That's a lot of words to say that.

9 **MR. QUSBA:** What -- I'm sorry, your Honor?

10 **THE COURT:** That's a lot of words to say that.

11 **MR. QUSBA:** There are a lot of parties to it.

12 **THE COURT:** Okay.

13 **MR. QUSBA:** And we can't say anything simply in this
14 case. In any event -- and there are other covenants in
15 there --

16 **THE COURT:** I have no problem authorizing the Debtor
17 to enter into negotiations that lead to a plan. I kind of
18 thought that was what their duty was to begin with.

19 **MR. QUSBA:** But --

20 **THE COURT:** I'm not being facetious.

21 **MR. QUSBA:** But, your Honor -- but a plan that
22 reflects the ten-page term sheet that's attached.

23 **THE COURT:** Right. And I understand that that -- I
24 understand that but that authorization should not be mistaken
25 as -- if I do it -- to anything other than go forward and good

1 luck to you because I'm not bound by anything that you agree to
2 do and that -- so, I mean, it's a matter of protecting
3 fiduciaries in the sense that the Court said we could go
4 forward on this basis with the understanding that the Court
5 hasn't given us blessing to the final product, I think is what
6 you're telling me.

7 **MR. QUSBA:** I am absolutely not assuming a blessing
8 to any -- I can't assume for tomorrow, let alone a plan
9 confirmation way out in --

10 **THE COURT:** Well, you can't. I've got a disclosure
11 statement that needs to be amended and a plan that needs to be
12 amended.

13 **MR. QUSBA:** Absolutely, your Honor.

14 **THE COURT:** So give me a break.

15 **MR. QUSBA:** Absolutely. No question about it. A
16 couple of other things on the OPCO support agreement.

17 **THE COURT:** Okay. I think that helps me understand
18 the OPCO support agreement. Thank you.

19 **MR. QUSBA:** Your Honor, a couple of other things on
20 the OPCO support agreement. Ms. Steingart, I think, spent a
21 little bit of time and said, hey, look, the support -- the OPCO
22 support agreement and the PROPCO support agreement, they can
23 each blow up. We've got dates that have past.

24 **THE COURT:** That's exactly right.

25 **MR. QUSBA:** Your Honor, we would not be wasting your

1 time if we weren't those dates. We would not be wasting your
2 time. We will amend those dates. In fact, we will use the
3 dates that you suggested at the beginning of this hearing with
4 respect to disclosure statements, confirmation hearings,
5 auctions and the like.

6 **THE COURT:** Well, if you don't, as I indicated, I'd
7 have a difficult time confirming any plan consistent with
8 1129(a)(1), (2) or (3).

9 **MR. QUSBA:** I'd have a difficult time appearing
10 before you then.

11 **THE COURT:** Good.

12 **MR. QUSBA:** I understand that. We all understand
13 that.

14 Lastly, your Honor, the splinters reference in their
15 papers that -- something about vote designation because of the
16 plan support agreement, the OPCO plan support agreement. First
17 of all, they did it in a response. Certainly that's not
18 procedurally adequate and they cite to a couple of Delaware
19 cases which subsequent to the Delaware decisions, actually
20 there's been a bench decision and *Owens Corning Ware* -- the
21 Delaware Court tried to distance itself with some of the plan
22 support agreements, I think, by -- or decisions by Judge
23 Walrath but more importantly in this Circuit, the cases in this
24 Circuit have taken a different view with respect to plan
25 support agreements, particularly with respect to whether they

1 constitute or should lead to vote designation with respect to
2 the parties who execute them.

3 In particular, your Honor, Courts here in the Ninth
4 Circuit, I believe, Nevada -- I have cites, *In Re: Snyder*
5 B.R.432, *In Re: Pioneer* 246 B.R. 626 take a very narrow
6 interpretation of solicitation in order to promote negotiations
7 and that's exactly what this support agreement is, as you
8 referenced, a giant LOI negotiation. And those Courts, I think
9 *Snyder* at 437 says, "Anything short of a request for an
10 official vote either accepting or rejecting a plan is not
11 solicitation." We don't have a plan that we could possibly be
12 soliciting votes for. We don't have a disclosure statement.
13 All of that the Debtor is working on and they'll get it around
14 when they can get it around obviously subject to your
15 requirements as far as dates are concerned.

16 So if there are any other questions, your Honor, I
17 turn the podium over to Mr. Nyhan.

18 **MR. NYHAN:** Good afternoon, your Honor, Larry Nyhan
19 on behalf of the PROPCO lenders. Your Honor, is it okay if I
20 put my water bottle up on that?

21 **THE COURT:** That's fine.

22 **MR. NYHAN:** Thank you. Your Honor, I'm not -- I'm
23 going to endeavor not to repeat any of the issues that
24 Mr. Qusba has discussed and I'll try to be brief. I'd like to
25 first address the transition events. Ms. Steingart expressed a

1 great deal of concern about the number of transition events in
2 the amended MLCA and your Honor did ask as part of that whether
3 OPCO had the obligation to provide the transition services and
4 the answer to that is "Yes." I think that -- and also I think
5 Ms. Steingart suggested that the services would be provided for
6 less than what was contemplated under the original MLCA and
7 that is not the case. In fact, the compensation is the same
8 except that it actually could be more expensive. If your Honor
9 looks at Section S, Romanette ii of the amended MLCA --

10 **THE COURT:** Hang on. Please --

11 **MR. NYHAN:** Yes, your Honor.

12 **THE COURT:** -- citation?

13 **MR. NYHAN:** It was Section S, Romanette ii of the
14 amended MLCA. There is now a requirement --

15 **THE COURT:** What page?

16 **MR. NYHAN:** I --

17 **THE COURT:** M2?

18 **MR. NYHAN:** S2.

19 **THE COURT:** S2. I'm sorry. I'm sorry. One moment.
20 That would be at Page 38 based, at least on the redline.

21 **MR. NYHAN:** That's correct, your Honor.

22 **THE COURT:** All right.

23 **MR. NYHAN:** There is now an obligation to begin
24 paying management fees at the time that another bidder is
25 selected as the successful bidder. Now, your Honor will recall

1 that under the original MLCA there was an initial transition
2 period of 60 days during which no management fee was -- it was
3 essentially without cost to PROPCO from the perspective of a
4 management fee. So in effect, just -- not that it's a huge
5 issue, we could end up having to pay management -- excuse me.
6 PROPCO could end up paying management fees sooner than it would
7 under the original MLCA.

8 But the real issue concerning the transition events,
9 your Honor, I think goes to the question of the timing at which
10 transition services can be required and I think we have to put
11 it in context of the -- again, the mechanics of the original
12 MLCA. The original MLCA was going to be a three-month deal, as
13 we know, and a couple of different things happened and, your
14 Honor, recall the PROPCO lenders were not at the table in
15 negotiating the original MLCA. PROPCO and OPCO negotiated that
16 and it was very clear that there would be a three-month period
17 of time during which the rent would be reduced. It was a
18 deferral period. The time within which OPCO had to assume or
19 reject the master lease was deferred for that period of time
20 and at the conclusion of that three-month period, the original
21 rent terms snapped back.

22 So the reduced rent that OPCO enjoyed during that
23 deferral period was eliminated and the original rent terms were
24 reinstated. Now, that period of time has been extended by
25 agreement, the deferral period, as the different matters

1 proceeded before the Court but the latest extension runs out in
2 mid-June and if the PROPCO lenders were to say -- fold our arms
3 on our chest and say, there's no agreement for any further
4 accommodation to OPCO, OPCO would be faced with both a deadline
5 in mid-June to assume or reject the master lease and a snap-
6 back of the rent obligation to the full amount if it didn't --
7 if it elected to assume the lease.

8 In that circumstance, mechanically there's virtually
9 no question based upon what's transpired in the last six months
10 before your Honor that the lease would be rejected and the
11 consequence of the lease being rejected is that the transition
12 services period would initiate. Now, what have we done in the
13 modified MLCA? Well, the PROPCO lenders have agreed to reduce
14 the rent to essentially break even. They further agreed to
15 extend the period of time and, your Honor, that reduced rent
16 continues -- that agreement for reduced rent continues until we
17 confirm the plan. Also have agreed to extend the time within
18 which OPCO can assume or reject the lease again until we get to
19 plan confirmation.

20 So the mechanics resident in the original compromise
21 agreement that would have permitted the PROPCO lenders to say,
22 we want transition services and we want them now. We're not
23 going to give you any further accommodation on the rent or on
24 the time period within which to assume or reject. Those
25 mechanics are gone and we replace those mechanics with a series

1 of events that are tied to, are we going with the joint plan or
2 not. Are we getting to a point where something has occurred
3 which indicates that there's going to be a separation and
4 therefore a need for the transition services?

5 And, your Honor, Ms. Steingart pointed you to Exhibit
6 C, Transition Events on Page 58, Paragraph 4 --

7 **THE COURT:** I'm there.

8 **MR. NYHAN:** -- and I wanted to go back to this one,
9 your Honor, because she left out some language which I think is
10 very relevant to the point I'm trying to make and it's not --
11 Section 4 does not say that it's a termination event if the
12 existing plan -- support for the existing plan is revoked. It
13 says that if the Debtor withdraws or revokes the proposed plan
14 or announces its intention not to support the proposed but
15 there's a bid exception and the exception is connection with
16 pursuing a stand-alone plan of reorganization supported by the
17 mortgage lenders.

18 Again, the concept is if we end up this plan doesn't
19 go forward but we are working with the Debtor to confirm a
20 stand-alone plan for PROPCO, this agreement remains in effect.

21 **THE COURT:** Your definition of Debtor would be the
22 PROPCO Debtor?

23 **MR. NYHAN:** It's either PROPCO or OPCO, either one.

24 **THE COURT:** All right. So it's a stand-alone plan of
25 either Debtor as long as it --

1 **MR. NYHAN:** Oh, no, no. I beg your pardon. It would
2 be a stand-alone -- I misunderstood your question, your Honor.
3 It would be a stand-alone plan for PROPCO.

4 **THE COURT:** That's what I thought.

5 **MR. NYHAN:** Yes, your Honor.

6 **THE COURT:** That's why I asked the question.

7 **MR. NYHAN:** Yes, your Honor.

8 **THE COURT:** It would have to be, I would think.

9 **MR. NYHAN:** So I don't want to dwell on the
10 termination events. It's not a substantive change to what had
11 been in the MLCA. It is a tweaking, if you will, of those
12 circumstances in which the transition services -- it's a timing
13 issue under which those -- the transition services will be made
14 available based upon events that we believe indicate that we're
15 no longer going forward on a combined basis.

16 **THE COURT:** Let me ask you this. There's a date of
17 June 21st. Confirmation is -- go back through this.

18 **THE CLERK:** The confirmation hearing date is --

19 **THE COURT:** The confirmation hearing date is now --

20 **THE CLERK:** August --

21 **THE COURT:** -- August 27th, is it not?

22 **THE CLERK:** August 27th.

23 **THE COURT:** And the sale date is?

24 **THE CLERK:** August 9th.

25 **THE COURT:** August 9th. So that -- what is the

1 implication of those two hearing dates with the June 21st?

2 **MR. NYHAN:** The June 21st relating to the tax
3 contingency -- the diligence contingency?

4 **THE COURT:** Yes.

5 **MR. NYHAN:** Your Honor, we're going to have to fish
6 or cut bait on that contingency by June 21st. So by the time
7 any other bids come into place, if we're still standing, that
8 contingency is gone.

9 **THE COURT:** If we are still standing -- who is "we"?

10 **MR. NYHAN:** I beg your pardon, your Honor. If PROPCO
11 -- excuse me. If the purchasers are still standing -- have not
12 exercised the diligence out --

13 **THE COURT:** That would be FG and --

14 **MR. NYHAN:** FG and the PROPCO lenders. If they have
15 not exercised the out by June 21st, they are bound. That
16 diligence contingency is gone and we're moving forward.

17 Your Honor, let me turn to the transfer event.
18 Again, Ms. Steingart asked the question of why would the
19 transfer event occur in a circumstance in which the plan of
20 reorganization embodying our proposed -- when I say "our," I
21 mean again the PROPCO lenders and FG's proposal to acquire
22 OPCO. If that's not confirmed, why is that a transfer event?
23 And the answer -- and it's a good question and the answer is
24 very straightforward, your Honor. Again as Mr. Qusba
25 indicated, the deal we negotiated was that if we give a firm

1 stalking horse bid and we honor our obligations under the bid
2 in connection with that bid and that bid does not close for
3 reasons beyond our control, we then are entitled to receive the
4 assets on the terms agreed.

5 Now, the transfer events, therefore, track primarily
6 two situations when that occurs. Mr. Qusba referenced this.
7 The first is if there's a topping bid and the period of time
8 for us to get an alternate bid has expired. So essentially if
9 there's a topping bid, people are going for it. At that point
10 we're not going to be the bidder -- excuse me -- the buyer and
11 so we get the benefit of our bargain.

12 The other circumstance is if the Court, your Honor,
13 refuses to confirm a plan on a cram-down basis. Now, why do we
14 do that? The reason, your Honor, is that I can point to
15 Mr. Goldberg who claims to have numerosity -- a numerosity
16 block was his statement -- with respect to the splinter group
17 of banks. Now, part of the transaction, your Honor, in this
18 plan involves the extension of financing by the PROPCO lenders
19 to the buyer, material part of the plan and quite frankly, I
20 expect it's going to be a material part of any bidder's
21 proposal here.

22 As your Honor knows, we cannot expect to have the --
23 outside of a bankruptcy proceeding and in particular outside of
24 a plan of reorganization, we cannot cause lenders, require
25 lenders to extend financing in connection with an acquisition.

1 So either the class of PROPCO -- excuse me -- OPCO lenders is
2 going to agree by a requisite class vote to support the
3 extension of financing to the bidder or the Court is going to
4 have to determine that the Court can impose that extended
5 financing on a cram-down basis and if the Court -- if the class
6 either accepts or the Court believes that the Court is
7 appropriate to cram down, the plan gets confirmed and we're all
8 on our way.

9 If, on the other hand, the Court does not -- excuse
10 me -- there is not class acceptance and the Court is not
11 comfortable cramming down -- we think it is a cram-down issue,
12 that it can be crammed down but if the Court disagrees and
13 declines to confirm the plan, in that circumstance, we are
14 still entitled to the benefit of our bargain, that is the
15 transferred assets at the agreed price because we did
16 everything that we agreed to do and it was factors beyond our
17 control, namely the dissidents of the OPCO lenders that
18 prevented the transaction from being completed. So that's why
19 the transfer event will occur in a circumstance where the plan
20 is not confirmed or the Court declines to cram it down.

21 That, your Honor, also addresses another issue that's
22 been raised and that is the question as to why does this
23 transaction have to be tied to a plan of reorganization. It's
24 the very same answer, your Honor. There is no way that anybody
25 could reasonably expect to get unanimity from the group of OPCO

1 lenders with respect to debt financing for this plan, no way
2 and we expect -- we don't know but we expect -- and Mr. Qusba
3 could be -- is more knowledgeable about this than I am but we
4 expect that any bidder who comes in here is going to want that
5 financing.

6 So certainly with respect to the plan that's on the
7 table and the stalking horse bid and in all likelihood with
8 respect to any competing bid, there is going to have to be a
9 means of approving that extended financing and the only way to
10 do it absent unanimity -- excuse me -- absent unanimity is
11 through a plan of reorganization. So all other issues aside,
12 this transaction is going to have to be done through a plan.

13 A point of clarification, your -- I'm sorry. Did
14 your Honor have questions?

15 **THE COURT:** No.

16 **MR. NYHAN:** A point of clarification, Ms. Steingart
17 referred to --

18 **THE COURT:** Excuse me, yes, I do. I understand the
19 reasons that the stalking horse bidder and PROPCO wants the
20 benefit of its bargain but does that address the issue of the
21 benefit that may not be accruing to the -- to all the OPCO
22 creditors in that situation if that bargain is at a number --
23 is valued at a number that is less than what could be obtained
24 if -- subject to its own auction --

25 **MR. NYHAN:** Well --

1 **THE COURT:** -- for those assets? I hope that
2 question makes sense.

3 **MR. NYHAN:** I think I understand the question, your
4 Honor, and I want to get to it in a minute, the whole issue of
5 a separate auction or an auction of these assets but I think
6 the answer to that question is -- turns on the reasonableness
7 of the proposed settlement because if -- given all the factors
8 that are germane to evaluating the reasonableness of that
9 settlement, the Court concludes that it should be approved or
10 it warrants approval, then the fact that the bargain, as it
11 were, will be effected even if a plan is not confirmed on the
12 basis that I've stated should withstand any scrutiny.

13 I just wanted to touch briefly, your Honor, on the --
14 what I think was the phrase, "the excluded asset optionality"
15 and just to be clear, while I understand that the Debtor's bid
16 procedures envision the circumstance where the stalking horse
17 bidder may elect to exclude -- let me not use a double exclude
18 -- to omit from taking title to certain of the excluded assets
19 and has provided in the bid procedures to deal with that
20 circumstance, there is no optionality from the perspective of
21 the stalking horse bidder with respect to paying the
22 consideration required, the 35 million and assuming the
23 liabilities. If the stalking horse bidder takes any excluded
24 liability, computers, software, anything, we pay the full
25 price, full stop and while I --

1 **THE COURT:** What if they don't take any?

2 **MR. NYHAN:** Pardon me? If we don't take any? Your
3 Honor, I can assure you that we wouldn't have spent the time
4 that's been spent here to fight for this agreement to not take
5 the assets that are very important to us.

6 **THE COURT:** Then why is that contingency in the
7 bidding process?

8 **MR. NYHAN:** The contingency is in there, your Honor,
9 I assumed to deal with the circumstance in which we elect to
10 exclude some portion of the excluded assets from our taking
11 title to them in which case the question is, what happens to
12 them and the answer is that the --

13 **THE COURT:** They're sold.

14 **MR. NYHAN:** They're sold the bidder subject to the
15 liens of the --

16 **THE COURT:** Sold to the bidder and you still have the
17 obligation to pay the 35 plus assume that in all of that
18 other --

19 **MR. NYHAN:** That is correct, your Honor.

20 **THE COURT:** -- the consideration still flows.

21 **MR. NYHAN:** That is correct, your Honor. So we do
22 not have an option to scale down what we're paying here.

23 **THE COURT:** That probably needs some clarification.

24 **MR. NYHAN:** Your Honor, I'd like to turn now to this
25 question of a market test for the excluded assets and what I

1 really want to talk about are the assets that are subject to
2 the modified lease agreement -- compromise agreement.

3 We've got, by my count, basically five categories of
4 assets. We've got computers and software. We've got
5 furniture, fixtures and equipment. We've got the customer
6 lists, or more accurately, the primary customer lists. We've
7 got what I would refer to as temporary transitional licenses --
8 essentially those licenses that are granted to PROPCO to use;
9 for example, the Station brand for a limited period of time as
10 it de-brands and transitions out of the use of those property
11 rights. And then we've got the PROPCO brands; that is, brands
12 that are unique to PROPCO.

13 Now, I think the real question and your Honor really
14 put your finger on it earlier when you said that the relevant
15 inquiry should be, "What is the value," or certainly a relevant
16 inquiry is, "What is the value to PROPCO versus what is the
17 value to OPCO?" But when we talk about an auction process or
18 including excluded assets in the auction, then what we're
19 talking about is what is the value of these assets to a buyer
20 of OPCO's assets? Because the question is, is it going to
21 increase? Is it going to raise the needle on the purchase
22 price or not? And I think if we look carefully at each of
23 these categories, we'll see that it's not and, in fact, there
24 are restrictions in the existing compromise agreement that
25 would be violated if, in fact, these were put into an auction

1 like that.

2 Now, let me first identify or go back on those
3 categories and identify those to which PROPCO is entitled under
4 the existing MLCA -- not amended MLCA, but the existing MLCA --
5 without paying additional consideration or the PROPCO lenders
6 are entitled to under the MLCA.

7 First is the furniture, fixtures and equipment at the
8 different OPCO subsidiaries that are operating the four
9 casinos. Those are all subject to liens in favor of the PROPCO
10 lenders and under the existing MLCA we are entitled to get
11 those. So, those can't be put in the auction.

12 Second is the customer list. Well, your Honor, under
13 the existing MLCA, PROPCO is entitled to get the customer list.
14 Now, I know there's an issue of exclusivity and I want to come
15 back to that in a minute. But PROPCO doesn't have to pay for
16 the customer list. It's entitled to get it. So, customer
17 list, subject to the exclusivity point, shouldn't be in an
18 auction.

19 The third is temporary transitional licenses. Again,
20 under the existing MLCA, PROPCO's entitled to it. It doesn't
21 pay any additional amount for it.

22 And then, finally, there are the PROPCO brands and
23 the PROPCO brands -- I'm sorry. I skipped over the computers
24 and software.

25 The IT and IP system and the PROPCO exclusive brands

1 are two categories of property to which PROPCO is entitled but
2 for which a price must be determined.

3 Now, before I turn to those two, let me go back to
4 the customer list for a moment. As I understand the objectors'
5 argument, they're saying the primary customer list that belongs
6 to PROPCO, or PROPCO's primary customer list, basically should
7 be offered to a competitor -- namely the only one identified is
8 Boyd -- to see if Boyd would pay for this very sensitive
9 competitor information. Now, I acknowledge, your Honor, that
10 the existing MLCA is silent on the issue of exclusivity. It
11 says that PROPCO is entitled to the primary customer list. It
12 doesn't say to the exclusive use of the primary customer list.

13 But your Honor, I cannot believe -- and again, we
14 were not at the table -- "we" meaning the PROPCO lenders were
15 not at the table -- negotiating this. But I cannot believe
16 that the parties who did negotiate this, or the Court for that
17 matter, understood that giving PROPCO the right to its primary
18 customer list under the MLCA also meant that OPCO could turn
19 around and run down the street right after doing that and sell
20 that very -- that exact, highly competitive information to
21 Boyd. That could not have been the intention.

22 And, in fact, it's clearly not the debtor's
23 intention, as reflected in the bid procedures, because the
24 debtor has provided, as your Honor pointed out earlier, that
25 the casinos -- the different casino properties -- can be sold

1 separately or that is to say that bidders can bid for
2 individual casinos, or they can bid for all the casinos. It's
3 up to the bidder.

4 But the debtor has been very careful to provide that
5 the primary customer list information relating to a particular
6 casino will remain with that casino and will be exclusively
7 used by that casino. And, in fact, the debtors have required,
8 in connection with the agreements with PROPCO, that PROPCO
9 agreed that if PROPCO is not the buyer of OPCO and PROPCO
10 receives the customer list as it's entitled to receive it under
11 the MLCA, then PROPCO must purge the customer list it receives
12 of primary customer data from the other casinos.

13 That's how it's all set out right now, your Honor.
14 So, while I can't believe that the interpretation suggested by
15 the objectors is anything that anyone expected when the
16 original MLCA was negotiated and when the agreement to give
17 PROPCO its own customer -- primary customer -- list was
18 included in that agreement, I would say, your Honor, if there
19 was ever a case of a circumstance where what's good for the
20 goose is good for the gander, this is one. It would be highly
21 inequitable to permit the OPCO estate to essentially sell
22 highly competitive customer list information from PROPCO to
23 PROPCO's competitors, but at the same time require PROPCO to
24 purge from the customer list to which it is entitled any
25 primary customer information from the other casinos.

1 But let me go back. How is a market test going to
2 demonstrate that people would pay more for the excluded assets?
3 Well, I don't think it's going to, your Honor. Now, we've
4 already talked about FF and E. We've talked about the customer
5 list. We've talked about transitional licenses. None of those
6 are being sold to PROPCO. PROPCO's got a right to them under
7 the MLCA as it exists today. Period. Full stop.

8 So, what's being sold and therefore under the
9 objectors' argument should be subject to some form of market
10 test are the computers, the IT systems and the IP systems --
11 excuse me -- the IT systems and the software that runs those --
12 and the PROPCO brands -- PROPCO exclusive brands.

13 Let's look at those individually. The deal that's
14 been cut with respect to the excluded assets essentially
15 requires that the stalking horse pay -- the PROPCO lenders pay
16 -- \$30 million cash. Everyone will deduct from that the what I
17 think is an undisputed \$15 million that's going to be required
18 to stand up, I think is the expression, OPCO.

19 Now, any buyer of OPCO, if this transaction is
20 approved, any buyer of OPCO will end up with a turnkey state of
21 the art computer system. They will end up with all ownership
22 of all of the software. So, if you were to say to a bidder,
23 "Well, you know, you're not going to get a turnkey system.
24 You'll get all the software but not a turnkey system. But you
25 will get the two server systems that are on PROPCO properties.

1 It's just going to take a while to get it. And then, you can
2 use those to run your operations or sell them, if you wish,"
3 what is the impact going to be on the price? No buyer is going
4 to increase its price for the privilege of getting ten-year-old
5 computer systems that reside in PROPCO, particularly when they
6 don't have a turnkey system because of that arrangement for
7 their own operations the day after they close.

8 We've heard the testimony of Mr. Krieger about the
9 nightmare associated with trying to shut down those servers,
10 bring them over -- this is the rip out, as your Honor has read
11 the testimony. Any purchaser facing that I suggest to your
12 Honor is going to say, "No, thank you. I want a stand-up
13 system and whatever it cost. I'm not going to wait." And by
14 the way, your Honor, let's not forget that under the existing
15 MLCA, PROPCO has the right to be serviced with those computers
16 uninterrupted -- uninterrupted -- for 150 days once the
17 transition period starts.

18 So, it's not only a question of the problems
19 associated with taking those servers out, putting them into the
20 operations and starting them up again, it's also the question
21 of a purchaser can't even begin to do that until the full
22 transition period has expired.

23 And I suggest to your Honor that in that
24 circumstance, the purchaser -- unless they're just not going to
25 use the system at all because they've got their own systems, in

1 which case they're not going to be prepared to pay much for
2 them, if anything -- I suggest, your Honor, that in that
3 circumstance, a purchaser is going to say, "Uh-uh. I've got to
4 be stand up. I've got to have a new computer as my backup and
5 I've got to have the upgrades that are necessary so that my
6 business runs from day one. And whether I pay for it and
7 reduce the purchase price or whether the case comes out of
8 OPCO, either way, it's going to have to be done."

9 So, with respect, your Honor, to the computer
10 systems, I don't think any buyer is going to pay one dime more.
11 In fact, they will reduce their price if they don't get the
12 turnkey system that this deal affords them.

13 But that's not where the trouble stops, again on the
14 computers. I know that we've heard that the ownership dispute
15 and lien disputes relative to the computer systems, they've
16 been characterized, I think, by Mr. Goldberg as a ruse; that we
17 haven't, you know, heard about this before. So, people have
18 evidently made up this issue.

19 Well, let me address the timing. There's a good
20 reason why you haven't heard these fights -- battles -- before,
21 your Honor. And that's because there's not been a reason to
22 have to determine ownership or lien overlap, because we weren't
23 separating things. When we engaged in negotiations with the
24 OPCO lenders and when both the OPCO lenders and the PROPCO
25 lenders looked to the respective debtors and said, "Who owns

1 this stuff? Where is title? How was it acquired? Where's it
2 located? How does it work?" everyone began to learn a lot more
3 than we thought we ever needed to know about the IT systems.
4 And a couple of very serious potential disputes arose out of
5 that investigation.

6 Your Honor has heard the testimony of how the debtor
7 believes that the fractionalized ownership concept; that is to
8 say, they allocate expenses between OPCO and PROPCO on a
9 percentage basis and all these computer systems and everything
10 else are acquired -- software, as well -- developed, based upon
11 a 40/60 split and, in their view, it's a 40/60 ownership split.
12 One dispute, that because 40 percent of the expenses were
13 attributable to the PROPCO side, 60 percent to OPCO side, so if
14 they had to determine who owned this equipment and the software
15 that was purchased and/or developed on a shared expense basis,
16 they would say 40/60 -- 40 percent OPCO, 60 percent PROPCO.
17 Excuse me. I reversed that. It sounds better that way,
18 though.

19 The OPCO lenders would certainly dispute that. But
20 there's going to have to be a basis and there's going to have
21 to be a determination by this Court as to how title is
22 determined with respect to that equipment. That's argument
23 number one.

24 Fight number two you saw in FG PROPCO's pleadings
25 concerning the question of whether the servers that have been

1 in the PROPCO locations for some ten years now and are fixed to
2 the premises are fixtures, which, under law would become part
3 of the PROPCO -- would be owned by PROPCO. Fight number two.

4 Fight number three, under the agreements that exist
5 in connection with the PROPCO financing, PROPCO receives a lien
6 -- was granted a lien by OPCO on equipment and other mechanical
7 devices that are situated at and used in the operation of the
8 PROPCO properties.

9 So, you have three separate fights that are going to
10 have to be addressed: Who owns it and how much? -- the
11 fractionalized interest fight; Are there fixtures? -- the
12 PROPCO fixtures, they're mine fight. And then the third fight
13 is under the relevant loan documents and security agreements,
14 whose got the prior lien on this? So, are these potential
15 fights a ruse? I think not, your Honor. You see how much time
16 and energy is devoted to challenging the settlement on the
17 excluded assets. I can assure you that a multiple of that will
18 be spent on fighting these issues if the settlement's not
19 approved.

20 Now, there's one other issue that complicates this,
21 your Honor, as it relates not only to the computers but also to
22 the PROPCO brands -- unique PROPCO brands. Now, we've heard,
23 your Honor, that PROPCO doesn't really compete with OPCO and
24 OPCO, a buyer of OPCO, would not have -- certainly from the
25 debtor's side, at least -- any use for the PROPCO brands. But

1 let's just put that aside, because what's being proposed is
2 that we take the brands and we auction them and the highest
3 bidder wins -- same thing with the computers, presumably,
4 although as I explained, I don't see how that works.

5 But there's another problem and the problem is that
6 under the existing MLCA, PROPCO's got the right to buy those
7 brands. It's unequivocal. It doesn't say it's got the right
8 to buy them in an auction. It doesn't even mention auction.
9 It says, "PROPCO will have the right to buy those brands."

10 Now, it's got to pay for them and the pricing term is
11 left open. And how does the MLCA deal with the pricing term?
12 It says, well, there's got to be an agreement as to pricing.
13 And if there's no agreement, it says your Honor's going to
14 determine the value. There's going to be a valuation fight in
15 front of your Honor. That's how it is determined.

16 Now, how can you put an asset in an auction, your
17 Honor, and say, "This is going to go to the highest bidder,"
18 when there's already a Court order in place saying that PROPCO
19 gets that asset? You just can't do it, your Honor. It would
20 violate the MLCA.

21 Now, we were all aware of the provision of the MLCA.
22 We wanted to get a deal on the excluded assets. And we said,
23 "Let's try to reach an agreement." And who did we -- and when
24 I say "we," I mean PROPCO and the PROPCO lenders, and FG -- who
25 did we negotiate with? Well, we negotiated with OPCO. We

1 negotiated with the OPCO lenders.

2 And why? Well, because OPCO owns a substantial
3 amount of the excluded assets, although not all. And the OPCO
4 lenders have liens on all -- most all -- of that which OPCO
5 owns. And it's pretty evident, at least based upon the level
6 of the stalking horse bid and the level of the OPCO debt, that
7 the OPCO lenders, any way you look at this, are going to have a
8 significant deficiency claim. They have the primary economic
9 interest in those assets. They have an economic interest that
10 is completely adverse to the economic interest of the PROPCO
11 lenders and FG as it relates to those assets. And the
12 negotiations ensued. They were very difficult and they
13 concluded.

14 Now, your Honor, I believe that the intent of the
15 MLCA was to say, "Adverse parties should negotiate and reach
16 agreement on the price and if they do, that's the price." And
17 if they cannot reach agreement, then your Honor will decide.
18 Well, your Honor, that's precisely what's occurred here. There
19 can be no question but that the OPCO lenders had every economic
20 interest to maximize what they received from those assets and
21 that the PROPCO lenders had every bit as much interest in
22 minimizing it.

23 So, your Honor, I think that that --

24 **THE COURT:** Where are the debtors in this?

25 **MR. NYHAN:** They are participating. They are

1 providing information. They are assisting the parties and
2 resolving open issues.

3 **THE COURT:** It's their assets.

4 **MR. NYHAN:** That is correct. I don't mean to
5 suggest, your Honor, that the debtors did not have a very
6 active role in this.

7 **THE COURT:** What was it?

8 **MR. NYHAN:** They were fully involved in the
9 negotiations.

10 **THE COURT:** What was OPCO's role? I don't have --
11 where's the testimony regarding the active negotiations by OPCO
12 as the debtor? What I have read, unless I missed a point --
13 and perhaps Mr. Kreller could help me when he argues -- is that
14 as Dr. Nave said, "The negotiations occurred between the
15 lenders because the lenders were the owners and they kept us
16 informed." And as Mr. Goldberg said, "We facilitated the
17 discussions." Mr. Haskins said, "I facilitated and provided
18 information."

19 The sense I get from this is that it was a
20 recognition that the real economic control or leverage in that
21 was at the level of the lenders and not at the level of the
22 debtors.

23 **MR. NYHAN:** Oh, I think that's right, your Honor.
24 When it goes to the question of the economics -- in other
25 words, the price -- if the OPCO lenders were prepared to accept

1 a price for their collateral that the PROPCO lenders were
2 prepared to pay, I don't think that the debtors viewed it, and
3 certainly the debtors can speak for themselves, but viewed it
4 to be their position to say, "You people don't know what's in
5 your own best interest. These numbers are not right."

6 I mean, clearly, the economic stakeholder on --

7 **THE COURT:** Well, a debtor in possession has the duty
8 to maximize the value of the assets for all of its creditors.

9 **MR. NYHAN:** Yes, your Honor. Well, it wasn't the
10 question, though.

11 **THE COURT:** So, if I'm the debtor, I say -- 'cause
12 here's what I'm being told. "You're selling these assets. You
13 don't even have good valuations; in fact, you don't have any
14 real valuation testimony. You've got some indicative value of
15 some, if not all, of the assets. I understand others have
16 already been subject to a master lease compromise agreement.
17 But those that aren't, even aren't subject to that, we think
18 could further benefit our creditors and you should get more."
19 How do you respond to that?

20 **MR. NYHAN:** I mean, I guess --

21 **THE COURT:** Because that's what I've been told.

22 **MR. NYHAN:** Well, first of all, your Honor, the
23 debtors were fully involved in these discussions, because their
24 knowledge of the assets was essential for parties to be
25 informed with respect to negotiations.

1 **THE COURT:** Did the debtors negotiate the
2 consideration?

3 **MR. NYHAN:** I think that it is fair to say that the
4 debtors were involved in the negotiations and the
5 consideration.

6 **THE COURT:** So, the answer is no. They were
7 involved.

8 **MR. NYHAN:** Well, your Honor, I don't think --

9 **THE COURT:** Did I miss it? Because I didn't see any
10 testimony by any representative of the debtor that they
11 negotiated the value to be paid, or the consideration to be
12 paid for the excluded assets other than they were satisfied
13 with the work that had been done by the lenders and the
14 lenders' advisors. That's what I thought I read.

15 **MR. NYHAN:** Well, I think that's fair, your Honor.

16 **THE COURT:** All right.

17 **MR. NYHAN:** So, your Honor, at this point I will echo
18 Mr. Qusba, but only briefly. This is a comprehensive
19 settlement. The OPCO estate receives a firm stalking horse
20 bid; got the Texas put issue fixed. If there's an overbid,
21 they will also receive the \$35 million plus the assumed
22 liabilities of \$13 million in connection with the excluded
23 assets. It will eliminate litigation over who owns the
24 excluded assets and who's got liens on them. Importantly, it
25 provides a turnkey operation for any OPCO buyer.

1 In the PROPCO lenders and FG's perspective, if
2 there's no overbid, we end up with the OPCO assets. If there
3 is an overbid or if the plan cannot get confirmed, we have the
4 certainty of a fixed price for the excluded assets. And that
5 is -- and I'm sure your Honor appreciates that -- but that is
6 critical to the willingness to provide a stalking horse bid.

7 Your Honor, I'm delighted to answer any further
8 questions you might have, but that concludes my presentation.
9 Thank you, your Honor.

10 **THE COURT:** Who's next?

11 **MR. GARCIA:** Your Honor, I'll be very brief.

12 **THE COURT:** Does anybody need a break right now? Let
13 me just ask you. Okay. Let's get going. You all right,
14 David? You all right? Okay.

15 **MR. GARCIA:** Your Honor, I will narrow my comments as
16 much as I can to not restate what's already been stated by
17 Mr. Qusba and Mr. Nyhan.

18 I think it is important, though, your Honor, that we
19 view this compromise from all angles, including the angle of
20 PROPCO; and that is that it's been sort of lost here through
21 all this litigation and noise and it should be clear is that --
22 and Mr. Goldberg stated this a little bit -- and that is PROPCO
23 has its own creditors. OPCO has its own creditors. PROPCO is
24 a debtor in possession. PROPCO is entitled to all of the
25 protections of the Bankruptcy Code. It's entitled to the

1 equitableness and the protections that the Bankruptcy Code
2 provides regarding the automatic stay, with regard to not being
3 gouged.

4 It's important, your Honor, that we view this from
5 the PROPCO side, at least at some point, and that is there are
6 no objections at all on the PROPCO side. There have been no
7 objections whatsoever. PROPCO lenders are on board. The mezz
8 lenders are on board. There are no objections whatsoever on
9 the PROPCO side. The only objections are from the OPCO side,
10 which is the committee and the splinter group.

11 **THE COURT:** And their response is, "Well, there
12 shouldn't be any objections because you're getting such a great
13 deal." I can figure that one out.

14 **(Laughter)**

15 **MR. GARCIA:** Fair enough. So, let's address the
16 "great deal" that PROPCO is getting, but I do want to clarify
17 some points that were made by Ms. Steingart and Mr. Goldberg.

18 **THE COURT:** Please.

19 **MR. GARCIA:** And I'll turn a phrase from
20 Mr. Goldberg. They stated earlier, both of them did, with
21 regard to the conflict issue that Mr. Haskins was both an
22 officer at OPCO and an officer and a board member of PROPCO;
23 and that through resolution Mr. Haskins was allowed to
24 negotiate on behalf of PROPCO.

25 Your Honor, we clarified that when we were here on

1 the 5th and I'll clarify it again today, because we've been
2 very clear on this point. That resolution states -- if you
3 read the rest of that sentence -- that there shall be no
4 changes whatsoever to documents to which they've been granted -
5 - willing to negotiate whatsoever unless they go back to the
6 independent directors and the complete board would vote in
7 favor of it.

8 So, to turn a phrase, their statement was not right
9 and it didn't seem right when they said it and Mr. Haskins does
10 not have the ability to negotiate on behalf of PROPCO.

11 **THE COURT:** He does not have the ability to enter
12 into any agreement.

13 **MR. GARCIA:** Exactly. Or make changes to any
14 agreement that has been previously approved by PROPCO.

15 **THE COURT:** Then what is he doing?

16 **MR. GARCIA:** Quite frankly, your Honor, there has
17 been no changes after it goes to the board of PROPCO unless it
18 goes back to PROPCO and we do a quick check with the
19 independent directors. Those changes are fine. We move
20 forward.

21 **THE COURT:** All right.

22 **MR. GARCIA:** Your Honor, the other, I think,
23 miscalculation and this was stated a little bit by Mr. Nyhan
24 and that is the pending compromise agreement is set to expire
25 in 20 days -- approximately 20 days. At that point, your

1 Honor, unless it's extended further, the rent will go back to
2 the original rent. So, we're not talking about \$1.5 million.

3 **THE COURT:** When you say the pending compromise
4 agreement --

5 **MR. GARCIA:** The original compromise agreement. The
6 one that's already been approved by this Court.

7 **THE COURT:** Because I consider the pending one to be
8 the one that's in front of me now.

9 **MR. GARCIA:** My fault, your Honor.

10 **THE COURT:** Okay.

11 **MR. GARCIA:** That compromise agreement that was
12 previously approved by this Court and is an order of this Court
13 and is binding on the parties.

14 **THE COURT:** The existing.

15 **MR. GARCIA:** The existing one.

16 **THE COURT:** Thank you.

17 **MR. GARCIA:** So, when we talk about, "Well, it's \$1.5
18 million; it's not a big deal," it is a big deal. Because in
19 that 20-day period that rent reduction can very much go away
20 and, I think, where we would end up is likely -- unless fees
21 agreements are approved -- is a lease rejection. And then, I
22 do think we have litigation like we've not seen before in this
23 case.

24 Where the issues of ownership of assets, lien issues
25 and then whether or not any of these assets to which have been

1 complained of as the excluded assets would violate the
2 contract, that compromise that's already been approved by this
3 Court, by doing anything other than what we've already agreed
4 to in the pending compromise, and as stated by Mr. Nyhan, what
5 we said before when we were here back in December in that
6 agreement was that those assets would be transferred to PROPCO.
7 And those to which PROPCO had a lien on -- and I want to go
8 over that a little bit, because there's very few times that
9 PROPCO has been more aggressive than the PROPCO lenders, but
10 maybe this is one of them, but also even if it didn't have a
11 lien on them, contractually by that pending compromise those
12 assets were to be transferred to PROPCO.

13 And what were going to be the valuations of that --
14 to be determined by the parties and the parties to that
15 agreement is OPCO and PROPCO -- and we've agreed. We were here
16 pursuant to the original compromise and we've agreed. It was
17 only if we didn't come to agreement would we come to this Court
18 and seek this Court's valuation of what would be paid. That's
19 already approved. That's an order of this Court.

20 With regard to the liens, your Honor, the master
21 lease states and this is part of the compromise -- the
22 compromise states that PROPCO is to receive all lease
23 collateral -- SCI lease collateral. It states that in the
24 compromise. What is that? When we get to the master lease
25 compromise, it talks about FF and E, that section 12.4 of the

1 lease. When they defined FF and E in the lease, the master
2 lease that's been filed at least ten times in this case, it
3 includes the computer equipment.

4 I know the senior lenders disagree, the pre-petition
5 lenders disagree and we will have a fight. And that's okay,
6 because I think PROPCO has a lien on that property. I think
7 that property is to get transferred. They disagree. But
8 what's important is the pending compromise resolves all those
9 issues.

10 And as your Honor is well aware, my client, PROPCO,
11 is willing to move forward with or without the PROPCO lenders
12 if that's what's in the best interest of PROPCO. In this
13 particular instance, we're staying on the same side of the
14 table. In this particular instance, your Honor, I think what
15 we have looked at and said, "What makes the most sense for
16 PROPCO," that PROPCO has stated, "Quite frankly, all of the
17 estates."

18 And I think that OPCO has stated it well and that is
19 this is a holistic approach. It's a holistic approach to the
20 entire transaction in which looking at the economics and what
21 makes sense for both OPCO and PROPCO is this compromise. Did
22 they get every penny they could out of PROPCO with regard to
23 the excluded assets? Unsure. Don't know. But what they did
24 get was a package that makes sense for everybody.

25 What doesn't make sense is to not move forward with

1 these plan facilitation motions, stop the process; and then, I
2 think what you have is ugly, nasty litigation which is exactly
3 what PROPCO wanted to avoid back at the end of 2009. And if
4 your Honor will recall, it was the PROPCO lenders' position
5 that, "We don't want a deal. We don't want any deal. We're
6 happy to take our assets, foreclose on what we have liens on
7 everything. We're ready to go home." PROPCO didn't want to
8 see that train wreck occur. It made sense to keep this thing
9 together, to enter into this compromise.

10 But now, our point is, "You've got to live up to that
11 compromise," and that compromise requires the transfer of
12 assets to PROPCO. And you can't sell them separately. Not
13 allowed to. And if you breach the compromise, it's clear in
14 the compromise those are admin claims. Those are admin claims
15 PROPCO would have in the OPCO estate for any breach whatsoever
16 of that compromise.

17 One point I did want to make and that was how do we
18 know whether or not we've hit the range of reasonableness with
19 regard to these assets? And I think, your Honor, from PROPCO's
20 perspective, the way to look at this is if there had been a
21 million dollars more paid or a million dollars less paid, who
22 would benefit? And those folks were at the table. You had the
23 PROPCO lenders and you had the OPCO lenders and it was taking a
24 dollar out of the OPCO lenders' pocket to go into the PROPCO
25 lenders' pocket, or vice versa.

1 And your Honor, if you've got the folks who are going
2 to be the ones that are losing the money and they've agreed to
3 this transaction and they are the ones supporting this
4 agreement, your Honor, I think what you have is a fair and
5 reasonable resolution. That's all I have.

6 **THE COURT:** I have a question. You represent the
7 debtor PROPCO, correct?

8 **MR. GARCIA:** Correct.

9 **THE COURT:** It's been alleged that what I'm being
10 asked to approve is an agreement arrived at by parties that
11 were serving two masters. (Indiscernible) you've responded to
12 that -- corporate resolution. And that there is -- I think,
13 primarily that OPCO -- a failure to satisfy the fiduciary
14 obligations because those folks have to be more than
15 facilitators. What's your response to that argument?

16 **MR. GARCIA:** What's my response that OPCO did not
17 fulfill its duty?

18 **THE COURT:** No. Well, first of all, the conflicts --
19 because the conflicts were also on the PROPCO side. You've got
20 the same financial advisor, Lazard, and in fact, the folks
21 don't even know who their financial advisor is.

22 **MR. GARCIA:** Your Honor, let me address that in two
23 points, because I do want to get a process issue first, and
24 that is there's been no objection that PROPCO didn't fulfill
25 its duty.

1 **THE COURT:** I think that's correct. I think that's
2 correct.

3 **MR. GARCIA:** In fact, these folks don't even have
4 standing to raise the issue. But to hit the point with regard
5 to Lazard, because I want to be specific; with regard to
6 Lazard, I can tell you PROPCO hired -- PROPCO has as its
7 investment advisor -- its financial advisor -- FTI. We have a
8 separate financial advisor at PROPCO.

9 Do you have an objection to that?

10 **MS. STEINGART:** Yes.

11 **MR. GARCIA:** Okay.

12 **MS. STEINGART:** There's no evidence in the record
13 that FTI provides any advice with respect to any of these
14 transactions that are before the Court. There's no evidence in
15 the record of that.

16 **THE COURT:** I think -- has FTI been hired?

17 **MR. GARCIA:** Yes, they have, your Honor.

18 **THE COURT:** I think that I can take judicial notice
19 of that. I understand your point --

20 **MS. STEINGART:** Right. My point is --

21 **THE COURT:** -- that they didn't have a role. They
22 may have been hired, but they didn't participate.

23 **MS. STEINGART:** Right.

24 **THE COURT:** That's argument.

25 **MS. STEINGART:** Right. Okay.

1 **THE COURT:** He's arguing.

2 **MS. STEINGART:** Right. No, no.

3 **THE COURT:** That's all this is.

4 **MS. STEINGART:** That was the only objection, that
5 there was not evidence.

6 **THE COURT:** I'm fully aware of that.

7 **MS. STEINGART:** Thank you, your Honor.

8 **MR. GARCIA:** Your Honor, I will concede -- I'll have
9 to go back and look through the depositions -- that there is
10 zero evidence that FTI didn't provide any advice, because they
11 did to PROPCO independent lenders.

12 That said, your Honor, and I can tell you from the
13 PROPCO specific position, we don't look at Lazard as our
14 financial advisor. Would we listen to what they had to say?
15 Absolutely. Would we listen to what a financial advisor for
16 anyone would have to say? We'd certainly listen to them. But
17 PROPCO does not view Lazard as its investment advisor, its
18 financial advisor and that's clear as to -- if we'd look at the
19 rationale as to why FTI was employed in the PROPCO case.
20 Because we needed at the PROPCO side when we were addressing
21 issues with OPCO to have an independent --

22 **THE COURT:** I want to make sure that I heard
23 Mr. Goldberg correctly. It was during your argument. You
24 indicated that the same -- even worse -- because the same with
25 Lazard -- represents both. Mr. Haskins thought Lazard was the

1 financial advisor for -- in my notes -- PROPCO or PROPCO
2 lenders?

3 **MR. GOLDBERG:** Mr. Haskins, I believe, testified that
4 he thought Lazard was the advisor for OPCO --

5 **THE COURT:** You said Nave thought Lazard was the
6 financial advisor for OPCO?

7 **MR. GOLDBERG:** Yes. And I think I -- at least I
8 meant to say Haskins also thought that Lazard was the financial
9 advisor for OPCO only, not OPCO and PROPCO.

10 **THE COURT:** Well, who thinks they represent PROPCO,
11 then, when you said it was both? Because that's what you told
12 me and I don't understand.

13 **MR. GOLDBERG:** Aronzon said we represent both.

14 **THE COURT:** Because you did make a different -- okay.
15 Now, I've sorted that out.

16 **MR. PARRY:** Your Honor, if I may, very briefly?

17 **THE COURT:** Yes.

18 **MR. PARRY:** A lot of this we're getting just from
19 Mr. Goldberg.

20 **THE COURT:** Right. But he cited to certain
21 provisions of the Haskins --

22 **MR. PARRY:** And I want to talk about that, at least
23 with respect to Nave. I've been trying to go through and
24 verify what he's saying.

25 **THE COURT:** Okay. I've got Nave in front -- I've got

1 that transcript. I just want to get this straightened out now.

2 **MR. PARRY:** With respect to Dr. Nave, if we look at
3 146, lines 17 through 22 --

4 **THE COURT:** One moment, please. Yes, I'm already
5 there. I have that marked.

6 "What is your understanding of who Lazard -- or which entities
7 Lazard represents in these bankruptcy cases?"

8 "Lazard is the financial advisor to our board."

9 "When you say 'our board,' do you mean the OPCO board?"

10 "Yes."

11 "Do you know whether Lazard is also the financial advisor and
12 investment broker to PROPCO?"

13 Answer: "PROPCO has their own financial advisors. I don't
14 know the names of them."

15 "Do you understand or do you have any understanding as to
16 Lazard, whether Lazard represents PROPCO in any capacity?"

17 "When there isn't a conflict, Lazard has been financial advisor
18 to PROPCO, but in this situation, Lazard is strictly OPCO and
19 it's my understanding PROPCO has their own legal and financial
20 advisors."

21 That's what I remembered.

22 **MR. PARRY:** That's not what he told us and it's, you
23 know, again, we're doing a lot of this on the fly.

24 **THE COURT:** Fair enough. I've already marked that.
25 I was aware. Thank you. That answers at least what Dr. Nave

1 thought. Thank you. Is there anything else?

2 **MR. PARRY:** No, your Honor. I was answering your
3 question.

4 **THE COURT:** No, I know. Is that it? Okay. Thank
5 you. Next? It's getting late. We're going to keep going.
6 We're going to get done. I don't have any choice. I'm not
7 going to get -- this is -- in case I wasn't clear earlier, I
8 heard from the proponents May 4th and 5th -- 5th, I think.
9 I'll hear then from the objectors and hear again from the
10 proponents and that's it. So, that's why I'm spending as much
11 time as I can verifying my notes. Go ahead, please.

12 **MR. DURRER:** Good evening, your Honor, Van Durrer,
13 Skadden Arps Slate Meagher and Flom on behalf of Dr. Nave. I
14 believe that my partner, Eric Waxman, who defended Dr. Nave's
15 deposition is also still on the phone with us, but he may not
16 be at this hour. His senior daughter is graduating today.

17 **THE COURT:** I see his name all the way through the
18 transcript, yes, sir.

19 **MR. DURRER:** Yes. He has a graduation today, so we
20 apologize --

21 **THE COURT:** Congratulations.

22 **MR. DURRER:** -- that he's not able to be here in
23 person.

24 I rise for, hopefully, less than ten minutes;
25 hopefully five, to address three points, your Honor, that I

1 think are important. One is there was a question raised, you
2 know, where was Dr. Nave? Where is Dr. Nave? The second is,
3 what's Dr. Nave's understanding of his responsibilities with
4 respect to the bidding procedures process? And the third is,
5 to the extent that -- well, has there been a market test with
6 respect to the excluded assets and, if not, why not? And I
7 think that Dr. Nave does have some information to shed on that.

8 So, first, where was Dr. Nave? Go back to his
9 deposition transcript, page 128, quoting from the witness, he
10 actually -- most of this argument comes right out of Dr. Nave's
11 mouth. He did me a big favor here today.

12 "Okay. I work a lot of hours, you know. I generally get up at
13 4:30 in the morning. I'm at my office around 5:30. I try to
14 end my day at 10:00. Don't always succeed. And I work seven
15 days a week."

16 And I'm going to skip, by the way, your Honor, "ums"
17 and "uhs" and "you knows" whenever I can to speed this up.

18 **THE COURT:** I can read the transcript.

19 **MR. DURRER:** I think it's important that everybody
20 hear this, your Honor, so I apologize for --

21 **THE COURT:** No, I said don't worry about leaving out
22 -- I can read the transcript.

23 **MR. DURRER:** Okay.

24 "But last year, you know, Stations took a mountain of my time,
25 several hundred hours, you know, pushing 900, I would say."

1 So, Dr. Nave has been in this process. He's been in
2 it perhaps more than most people in this room and certainly at
3 considerably less compensation than the folks in this room.

4 Ironically, your Honor, and I'm a little bit ashamed
5 to say this, while some of the lawyers involved, following Dr.
6 Nave's deposition, went to dinner after the deposition, Dr.
7 Nave actually went back and performed two surgeries. So, you
8 know, we take a little bit of offense at the comment that he's
9 not been around. He is around. He's very much involved.

10 All right. You know, frankly, in this world of
11 nuance, hyperbole, whack-a-mole, Dr. Nave actually is a simple
12 guy and that doesn't mean that he doesn't have a very
13 sophisticated understanding of what's going on here.

14 So, although it might not have been in the words that
15 Mr. Goldberg would have preferred in terms of what his
16 fiduciary duty is, I think that, again, Dr. Nave is very clear
17 on what his fiduciary duty is here. And I'm going, again, to
18 his deposition transcript; specifically, page 63 -- I'm sorry.
19 I apologize. Page 122.

20 "What is your understanding of what that means?"

21 His fiduciary duty. And this is starting on page 122
22 at lines 15.

23 "Well, that means I need to do my homework."

24 **THE COURT:** Well, why don't you start at 8?

25 **MR. DURRER:** Start at 8? Yeah, the question by

1 Mr. Goldberg:

2 "And in the course of your service as a director on
3 various boards of directors, have you come to an
4 understanding of the term fiduciary duty?"

5 "Yes."

6 "And what is your understanding of what that means?"

7 "Well, that means I need to do my homework to make
8 sure that I'm fully informed either through written
9 material or seeking advice from the appropriate
10 people whether -- and that might be on a different
11 thing -- different on different things, but do the
12 work to have myself fully informed and then make the
13 best business decision that I can make on that vote."

14 "And is there anything else that is encompassed
15 within the meaning of that term as you understand
16 it?"

17 "I think, to me, the term is that I just do the very
18 best I can and that I do that in an honest and
19 ethical manner without conflicts."

20 I think that's pretty clear. Dr. Nave also says in
21 this similar context, and this goes back to page 61, your
22 Honor. He's talking about what he's responsible for.
23 Mr. Alexrod had asked him about discussions regarding
24 amendments to the bidding procedures. And this is starting at
25 line 6.

1 **THE COURT:** One moment, please. Sixty-one?

2 **MR. DURRER:** Page 61, your Honor, starting at line 6,
3 "Who were those discussions with?"

4 **THE COURT:** Yes. I've got that in front of me.

5 **MR. DURRER:** Line 7, his answer:

6 "At the present time, you know, as I stated earlier,
7 I'm responsible for this and maybe it's a quirk in my
8 personality, but I have to be deeply informed and I
9 have to be very hands on. That's just who I am.
10 We've had discussions with Lazard about how we're
11 going to do this process; telephonic meetings with
12 several people from Lazard; and also with Skadden to
13 start the process. And one of the things that we
14 wanted was flexibility to make sure that we could do
15 what we needed to do to get the result that I
16 mentioned to you earlier."

17 And he goes on.

18 **THE COURT:** Well, I highlighted the next paragraph.
19 You might as well read it.

20 **MR. DURRER:** Certainly, your Honor.

21 **THE COURT:** I'll read it, because I highlighted it.

22 "And with that meeting with Lazard and Skadden, we've
23 gone through this where we are now, where things that
24 they're doing right now, things that I've asked them
25 to do, I've told them I want to be involved in

1 everything and I want to be hands on to look at this,
2 set up exactly how we're going to do it and that's
3 where we are."

4 **MR. DURRER:** And then lastly, your Honor, on this
5 point --

6 **THE COURT:** By the way, just so there's no question,
7 this is my yellow highlight.

8 **MR. DURRER:** This is on page 56, your Honor. And
9 again, it's in the context of Dr. Nave speaking about what his
10 responsibility is in connection with the bidding procedures and
11 the auction process.

12 **THE COURT:** You're starting at line 14?

13 **MR. DURRER:** Yes, your Honor. The question is:
14 "Please take a look at Exhibit 1. What is your
15 understanding of your role under the proposed bidding
16 procedures?"

17 There's references to the exhibits. The witness
18 finally answers:

19 "I'm responsible for everything about this motion.
20 Everything about it. And I'm responsible for making
21 sure that the rules are applied in a fair manner..."

22 **THE COURT:** "In a transparent manner."

23 **MR. DURRER:** Yeah, I apologize, your Honor.

24 **THE COURT:** Did you lose it?

25 **MR. DURRER:** I did lose it.

1 **THE COURT:** Well, I'll finish it just so we get done.

2 **MR. DURRER:** I appreciate that.

3 **THE COURT:** "...in a fair manner and a transparent
4 manner and that I will work with Lazard and Milbank
5 and Skadden to make sure that these rules are
6 transparent and fair. They will do everything they
7 can to get the best result and then evaluate all of
8 that and then, at the end of the day, I'll make a
9 recommendation."

10 **MR. DURRER:** Right.

11 **THE COURT:** And then, Ms. Axelrod asks:

12 "And that recommendation is going to be based on
13 what?"

14 "Well, it's outlined in here. I could turn to it if
15 you want. There's several things. But at the end of
16 the day, you know, our goal is to get the very best
17 deal we can for these OPCO assets and a deal that has
18 the greatest chance of closing. You know, we want to
19 get the best price, best deal we can get and we want
20 to get it to close. This company has been in this
21 process for a long time and this needs to happen. We
22 need to do this in a manner that will be successful,
23 but we need to get as much as we can for these
24 lenders and need -- and close it."

25 Once again -- I read that. Once again, the answer

1 indicates to me that he would work hard, just so you know how I
2 read this, but that so far as I can determine from this, based
3 upon the earlier reference that I read in, Dr. Nave believes
4 that the real benefit to this transaction is realizing he can
5 go to the lenders because of the amount that they're owed and
6 the value of the assets. That's my interpretation of his
7 testimony.

8 **MR. DURRER:** And as to the last issue, your Honor,
9 you know, whether there's been a market test, whether there
10 needs to be a market test for the excluded assets, he says that
11 -- and this starts on page 101 when he answers questions about
12 what drove his business judgment to come to the decision. And
13 it's exactly what we've already heard. We've already heard it
14 from Mr. Nyhan. We've already --

15 **THE COURT:** Page 101, line 11?

16 **MR. DURRER:** Yes, your Honor.

17 **THE COURT:** Read it. Because his independence is
18 really at the crux of what these objections are, I paid a great
19 deal of attention to this deposition. Do you want me to read
20 it?

21 **MR. DURRER:** No, no. I'm there, your Honor. He
22 says, starting at line 14:

23 "I think that the first agreement bought time. It
24 clearly stated that there would be more negotiations
25 on certain assets. And I think that as it became

1 clear that this company was going to separate, that
2 everybody realized that these issues needed to be
3 addressed and more clarity brought to the situation
4 of who owned what and how they were -- how it was
5 going to be done. And I think that, you know, OPCO
6 needed to know what was theirs, what was not theirs,
7 what they could sell, what they couldn't sell, how
8 they could come up with a plan to get to this bidding
9 process that we got now and that we had to come to
10 some agreement.

11 "Likewise, we wanted some more concessions on the
12 rent and I think it was part of the overall general
13 agreement. But I think that the things that the
14 second compromise did was necessary and critical to
15 get to this joint plan and to get to where we are
16 today."

17 And then, the last point I want to make, your Honor,
18 is he uses a fantastic analogy; again, Dr. Nave has a way with
19 words. And this is on page 180 of his deposition starting at
20 line 2:

21 "If there's a car sitting out there and you think you
22 own half of it and I think I own half of it, neither
23 one of us can drive it because of that, you know. If
24 we can settle who owns it, you know, that's an
25 advantage to both of us."

1 And that's why this is all wrapped together. That's
2 why all the plan facilitation motions are a package and they're
3 designed to get all of these debtors out of bankruptcy in a
4 reasonably prompt way. Thank you, your Honor.

5 **THE COURT:** Who's next?

6 **MR. WALPER:** Your Honor, Thomas Walper, Munger Tolles
7 and Olson, representing Frank and Lorenzo Fertitta, as well as
8 Fertitta Gaming. Your Honor, just 60 seconds, I beg the
9 indulgence of the Court before Milbank comes on with their
10 presentation.

11 I think it's just really important in light of the
12 accusations of fiduciary duty this and insider that and so
13 forth and so on. I sort of feel like I'm having a discussion
14 with my teenagers and they're raising this and that with me.
15 But as a result of that, I think it's very important to this
16 Court and that this Court understand that the Fertittas, as
17 well as Fertitta Gaming, are independently represented by my
18 law firm.

19 We have been working tirelessly with respect to
20 issues involving fiduciary duty, issues involving board
21 meetings, negotiations, acquisition agreements, support
22 agreements, commitments and so forth and so on. A number of
23 our lawyers have been doing it. We get up at very early hours
24 to do it. We are tired as well as the rest of the lawyers in
25 the room, I'm sure, are tired, as well.

1 But as well, the Fertittas know it because they're
2 paying our very large but very reasonable bills out of their
3 pockets.

4 And while, yes, the Fertittas are parties to these
5 negotiations and parties to these acquisitions and they are
6 also sitting on the OPCO board, we firmly believe and they
7 firmly believe that they have been important catalysts to this
8 reorganization process. They've lent cash as well as they have
9 lent their experience and management of these properties to the
10 PROPCO bid. They have provided an absolute exit to OPCO by
11 supporting without any kind of break-up fee the OPCO stalking
12 horse bid.

13 Your Honor, I think that --

14 **THE COURT:** Well, I kind of look at the break-up fee,
15 to be candid with you, as kind of a wash. They're not getting
16 a break-up fee, but the result is (indiscernible) PROPCO
17 assets. So, there's kind of a benefit.

18 **MR. WALPER:** Sure, your Honor, but at the same time,
19 you know, I'm not telling you anything new, break-up fees are
20 fairly standard. We've advised them, of course, that break-up
21 fee in this context doesn't make any sense at all.

22 **THE COURT:** I pretty well second that advice.

23 **MR. WALPER:** Tirelessly, your Honor. But at any
24 rate, they've worked hard. They believe they've been the
25 catalyst of this process. They absolutely believe that they

1 have discharged their fiduciary duties to the fullest.

2 **THE COURT:** It's argument. Thank you.

3 **MR. WALPER:** Thank you, your Honor.

4 **THE COURT:** Mr. Kreller, do you want to take a minute
5 or do you just want to go?

6 **MR. KRELLER:** Let's go, your Honor.

7 **THE COURT:** All right.

8 **MR. KRELLER:** Been sitting here a while, stretch my
9 legs. Your Honor, I'm going to answer your biggest question
10 head on. What did the debtors do here to maximize value?

11 **THE COURT:** That's my question.

12 **MR. KRELLER:** Your Honor, on the OPCO side what the
13 debtors did is they concluded that they needed to run an
14 auction and an auction of the OPCO assets needed to be held,
15 given the relative values, given the position of the secured
16 lenders and the inability to come to an agreement on a
17 different kind of a plan with the OPCO secured lenders, that an
18 auction was the path here.

19 In order to run an auction -- and by the way, I think
20 that's a pretty well-recognized concept in terms of maximizing
21 value. Our Supreme Court in *203 North LaSalle* certainly
22 recognizes that in other contexts. Your Honor, if you want to
23 run an auction, the first thing you need to do is figure out
24 what you've got to sell and that goes right to the heart of the
25 issues that we've spent the better part of three days, I

1 suppose, now in these hearings.

2 I note as an aside, your Honor, we're talking about a
3 bucket of assets that even at the high end of whatever ranges
4 people are talking about in terms of indicative values is less
5 than ten percent of the transaction value here. Talking about
6 a bucket of assets of 35, even if you want to call it 50, even
7 if you want to call it 75; is under ten percent of the
8 transaction value here. So, it is a little bit remarkable
9 we've got quite a bit of the tail wagging the dog here.

10 That being said, your Honor, again, to get to
11 conducting a meaningful and open auction which was OPCO's goal,
12 you've got to clear the underbrush, figure out what you can and
13 can't tell bidders about what you do and don't have to sell.
14 And that puts the new PROPCO purchase assets or the excluded
15 assets -- whatever else you want to call them -- directly in
16 play.

17 In terms of evidence on this issue; in terms of the
18 debtors' role, your Honor, the debtors sat in meetings in New
19 York with all of the parties who were involved in those
20 negotiations -- the PROPCO lenders, the OPCO lenders, Fertitta
21 Gaming. The OPCO debtors never sat with Boyd, but that's
22 because Boyd refused to engage with the OPCO debtors. And so,
23 if you want to wonder -- and Mr. Goldberg likes to talk about
24 this a lot -- about why the deference to the OPCO lenders, I'll
25 give you two reasons.

1 One, Boyd wouldn't get in a room with the OPCO
2 debtors. So, if people wanted to understand what Boyd had to
3 offer, we weren't given a choice of testing that for ourselves.
4 That was run through the OPCO agent and the OPCO steering
5 committee, not by our choice and not willingly on our part; but
6 those were the circumstances we were faced with.

7 Second, your Honor, and we've pointed to this before,
8 but I'll do it again at the risk of redundancy. The OPCO
9 lenders are being asked to finance this bid as they were being
10 asked to finance a potential Boyd bid, as they likely will be
11 asked to finance any other bid that comes in here.

12 And so, this isn't just a garden variety case where
13 you say the secured lenders are overreaching in terms of their
14 control as secured lenders. This is where you're looking at
15 them and saying, "Given values of these assets, given existing
16 credit markets, given debt levels, you guys are the only ones
17 who are likely to show up at the table and finance this bid."
18 And then, wearing that hat, they indeed do have a lot more
19 leverage than a garden variety secured lender sitting there
20 with his collateral and threatening to take it.

21 From an evidentiary standpoint, your Honor, you've
22 got an awful lot of testimony from Mr. Haskins in his
23 deposition. I guess I'd point you first to page 93 in his
24 deposition transcript where he talks about the process of
25 negotiations between OPCO and PROPCO regarding the prices being

1 discussed on the transferred assets. He characterizes the
2 negotiations as:

3 "In the process of negotiations between OPCO and PROPCO, which
4 were very actively participated in by the lenders on both
5 sides, you know, on the PROPCO side, that number for the asset
6 transfer started at ten million and during the course of 30 to
7 45 days, the parties tended to push that number together to get
8 to the compromise you ended up at."

9 And then, he goes on on that page to talk about who
10 attended those meetings. It was the steering committee of
11 lenders, it was the PROPCO lenders, it was the company and its
12 advisors.

13 Your Honor, similarly, pages 82 and 83 of the Haskins
14 deposition go on to discuss how the \$35 million figure was part
15 of a global compromise. And it talks about what things PROPCO
16 wanted and what things OPCO wanted. It talks about views of
17 the OPCO lenders and the steering committee with respect to the
18 Texas put. And it talks about --

19 "These really were things that weren't focused on in December,
20 since the issue in December was really resolving rent and now
21 that separation became real and everybody focused and they
22 realized on both sides that there needed to be a number of
23 gives and gets for everybody to maximize value."

24 Your Honor, if you want more, and this is kind of
25 sprinkled throughout the Haskins deposition testimony on page

1 70, at lines 6 through 10 is a discussion about --

2 "We were starting the negotiation to close the gap between the
3 bid and the asking..."

4 He's talking specifically about the Wild, Wild West
5 in this context. But again, testimony about OPCO's
6 participation -- active participation in the ongoing
7 negotiations.

8 And your Honor, I'd also point you to page 57 of that
9 transcript, starting at line 3:

10 "There were whole company discussions going on, at least as
11 early as the middle of December, which then evolved into
12 separation discussions during January and February. So, I
13 would be comfortable saying that there were discussions going
14 on with OPCO since January 1st."

15 Your Honor, that's just a sampling of the Haskins
16 deposition, clearly putting the company in the middle of these
17 negotiations.

18 There's also a great deal of testimony in the Krieger
19 deposition, as well as the Haskins deposition, as well, about
20 the OPCO debtors' analysis of the value of the excluded assets
21 and how those different components factored in different
22 scenarios for resolution of those issues and how the components
23 factored in and what ultimately became a resolution at the \$35
24 million number.

25 I hesitate to shorthand that, because as you've heard

1 and as I will repeat, there's a lot more to it. This is not,
2 "We are buying X assets for \$35 million." There's a lot more
3 to this compromise than that in both directions. I think
4 you've heard a lot of that and I think you've read a lot of
5 that in the testimony.

6 But if you're looking for where's the evidence of the
7 role the debtor played, I think I've just pointed you to a
8 number of examples and there's more.

9 Your Honor, I'm going to step back for a minute and
10 I, too, am going to try to avoid repeating a lot of what's been
11 said. Frankly, all of my colleagues who've spoken in support
12 of these motions have covered an awful lot of the points that I
13 think we covered in our opening argument. And I'm going to try
14 not to repeat, but I think there are a few points that are
15 particularly relevant.

16 I want to first talk about process a little bit
17 because to be honest with you, I find it remarkable that we're
18 standing here, we're 50 days -- 50, five zero days -- from the
19 day that the original motions were filed on April 7th. We are
20 38 days from the filing of the April 19 revised bidding
21 procedures and revised MLCA. There are nine depositions, nine
22 declarations, three days of hearings under our collected belt.
23 And we still have the objectors complaining about the April 7
24 declarations didn't include evidence about events that didn't
25 even happen until later in time. And we still have

1 Ms. Steingart saying, "I want a do over." I'm going to start
2 keeping track of how many do overs and continuances are
3 requested by our objectors here, your Honor.

4 So, let's think about the process. Think about the
5 amount of time that's elapsed. We're two times any notice
6 period that's required under any local rules that I'm aware of
7 for these kind of motions.

8 March 24th, we filed the plan and disclosure
9 statement. That was kind of the first, I think, really public
10 statement that this was going to go to an auction scenario on
11 the OPCO side. And the importance there is not just that an
12 auction was going to occur. The importance there is that the
13 auction was going to necessitate separation.

14 As we've talked about, the original MLCA was really a
15 safety net. With the filing of the plan and the separation
16 becoming a reality, it became the platform for the deal. And
17 to begin setting the stage for that separation, we needed to
18 deal with sale procedures that told bidders what they could buy
19 from auction and we needed revisions to the MLCA in order to
20 deal with what assets were not going in the auction, what
21 assets were going to PROPCO or staying with the debtors.

22 And those two things did go hand in hand, your Honor,
23 and the objectors can argue, "You don't need to approve the
24 master lease compromise agreement today. You can let that
25 wait." Well, you can't, your Honor, and the reason you can't

1 is twofold, but item number one from the OPCO debtor
2 perspective is I can't run an auction until I know what I'm
3 selling. And as long as I've got disputes over that, those
4 assets, whether it's because of pre-petition rights or whether
5 it's because of rights that vested in PROPCO and the PROPCO
6 lenders as a result of the original master lease compromise, I
7 can't run that auction. I can't tell bidders what it is
8 they're getting or how I'm going to deliver it to them. That's
9 answer number one.

10 So, your Honor, at this point in time we have -- we
11 know we're going to pursue an auction. We're going to pursue
12 revisions to the master lease compromise agreement. And we've
13 got a May 5th disclosure statement hearing staring at us. And
14 we look at our disclosure statement and think we're going to
15 have to deal with the bidding procedures in the MLCA to have a
16 meaningful disclosure statement to tell people what path we're
17 on here. And so, in the face of a May 5th hearing, on April 7
18 we rush and we file our motions -- the original motions. And
19 remember, the April 7 motions -- no agreement with the OPCO
20 lenders. Mr. Qusba's made that clear; in fact, quite the
21 opposite.

22 No stalking horse bid in place. The OPCO agent and
23 steering committee are talking to Boyd in a room that we're not
24 allowed in, but it's nowhere near in place. No settlement on
25 excluded assets or the price for those. There's a provision in

1 the April 7 master lease compromise that says, like the
2 original December version, PROPCO gets to buy certain of the
3 excluded assets, most of the excluded assets, but at a price to
4 be determined later.

5 So, Mr. Goldberg argues, "Why didn't the April 7
6 declarations have the \$35 million evidence in it?" The answer
7 is, "That hadn't been negotiated yet." That was a wide open
8 issue, their rights to purchase reside in the December version
9 and we were proposing to build on those in the April 7 version,
10 but we're not there yet. That's why.

11 Between April 7 and April 18, it was a pretty tough
12 10 to 12 days; meetings in New York around the clock;
13 conference calls around the clock; really just reflecting the
14 multi-party, multi-issue negotiations that you see embodied in
15 these agreements. You had negotiation between the OPCO lenders
16 and Boyd over the Boyd bid. You had negotiations between
17 Fertitta Gaming and the mortgage lenders over their bid with
18 the OPCO lenders, with the debtors having some visibility into
19 that, no visibility into Boyd.

20 You had the OPCO debtors negotiating with the OPCO
21 lenders about all of these issues, collaborating when they can
22 about issues where they have a common interest and otherwise
23 trying to figure out where we land and how we go about this
24 with the OPCO lenders saying, "We're going to run the process
25 because we've got Boyd and you don't." A tense, tough, 10 to

1 12 days. You've got everybody negotiating on the MLCA. You've
2 got everyone negotiating on the purchased assets and the Texas
3 put gets thrown into play.

4 And your Honor, I believe Ms. Steingart argued that
5 there is no evidence in the record about the Texas put
6 settlement or the justification for the back and forth. I
7 would just direct you to the Haskins declaration of April 28 at
8 page 4 -- at page 24 -- and also to the Genereau declaration
9 that I believe was also filed on the 28th -- paragraphs 24 and
10 25 in the Genereau declaration.

11 The result, your Honor? A whole bunch of tired
12 lawyers and grumpy business people, but the deals were cut and
13 on April 19, the revised compromise agreement, the revised bid
14 procedures and the OPCO support agreement which embodied the
15 stalking horse bid were filed.

16 And your Honor, here's where we come to reason two
17 why the bid procedures and the master lease compromise go hand
18 in hand. And Mr. Nyhan has stated this, as well. You can't
19 break it apart because the stalking horse bid is conditioned
20 upon the master lease compromise agreement. They go hand in
21 hand. It's a prerequisite. If you don't have the master lease
22 compromise -- and here's the "so what," Bonnie. I'm hearing
23 that.

24 **THE COURT:** Talk to me.

25 **MR. KRELLER:** If I'm the only one talking to you, I'm

1 happy to do that, your Honor.

2 **THE COURT:** Talk to me. I don't hear it. I'm just
3 listening to you.

4 **MR. KRELLER:** I understand, your Honor.

5 **THE COURT:** Reason two why the bid and the master
6 lease compromise agreement go together is because the stalking
7 horse bid is conditioned upon approval of the compromise.

8 **MR. KRELLER:** Right, your Honor.

9 **THE COURT:** That's where you stopped.

10 **MR. KRELLER:** Thank you, your Honor. I appreciate
11 that.

12 So, without the master lease compromise agreement and
13 the resolutions embodied therein, you do not have a stalking
14 horse bid. And the committee and the splinter lenders can
15 disagree with me and can disagree with OPCO, but the conclusion
16 from the OPCO debtors was that having a \$772 million stalking
17 horse bid was better than not having a \$772 million stalking
18 horse bid, particularly when the OPCO lenders were prepared to
19 finance that bid.

20 Your Honor, on an aside, I think you've got some
21 pretty good testimony from Mr. Genereau that there's actually
22 some significant benefit to having an insider sponsored
23 stalking horse bid, because the market takes that as an
24 indicator that the folks who know the most about the business
25 are willing to pay a relatively high price here. And let's

1 make no bones about it, at \$772 million we're talking about ten
2 times EBITDA multiple here as a purchase price. I think that
3 would be pretty tough to find a comp in the market anywhere at
4 those kind of levels.

5 So, your Honor, the April 19th filings happened.
6 There's more filings. There's the hearings on the 4th and the
7 5th. There's nine depositions. There's more filings. Here we
8 are on May 27th, again 50 days since the motions were filed, 38
9 days since the revisions. And still, the objectors stand here
10 and say, "We want a do over. We want four to six weeks."

11 We've had four to six weeks. And your Honor, the
12 argument that four to six weeks doesn't mean anything here,
13 we're talking about eight to ten million dollars of cash burned
14 a month -- six to ten, I guess, was Mr. Qusba's estimate in
15 professional fee burned. That's something. That's his
16 client's cash collateral, not theirs.

17 We're also talking about a scenario where the
18 stalking horse bid goes away and you're talking about a
19 scenario where unless OPCO finds a way to pay the full rent
20 under the master lease for June and months thereafter -- we're
21 in transition now, June 15th I suppose -- the much dreaded
22 transition that Ms. Steingart fears so much is upon us, your
23 Honor, in that scenario. The committee may not care. The
24 splinters may not care. The debtors do, because there's some
25 pretty dire consequences.

1 The bottom line, your Honor, we think it's awfully
2 hard for anybody to argue that we have anything less than a
3 completely full, probably overfull, and sufficient record at
4 this point. So, I want to move past that noise, your Honor,
5 and talk a little bit about what issues really are being
6 discussed here.

7 Number one, and this is kind of common to all --
8 across the motions -- and I'll address a few of these in this
9 manner. You know, we've heard the argument that the process is
10 tainted by conflicts. Familiar arguments, we've heard them
11 since August of last year. Familiar also in the sense that
12 they continue to be supported by no evidence whatsoever, other
13 than allegations that people occupy multiple roles. I don't
14 think there's any dispute about that.

15 **THE COURT:** Well, the evidence is they do occupy
16 multiple roles.

17 **MR. KRELLER:** I don't think there's any dispute about
18 that, your Honor, but multiple roles do not mean that there are
19 conflicts of interest that are tainting any process. The
20 conflicts have been disclosed since day one to the extent they
21 exist. They've been attacked and challenged throughout these
22 cases through multiple rounds of discovery on multiple issues.
23 And here's what they come up with, your Honor. Milbank
24 performed the ministerial task of forming the FG entity by
25 filing something with the Secretary of State's Office, or

1 however it's done. That's it. You've heard Milbank doesn't
2 represent Fertitta Gaming; never have once the entity was
3 formed.

4 Milbank drafted some iterations of the PROPCO support
5 agreement. Well, your Honor, two things there: One, when that
6 document was being negotiated, there was a possibility that
7 PROPCO was going to be a party to the agreement. That turned
8 out not to be the case, but that was not always the case.

9 Number two, that support agreement is something that
10 the parties to that agreement were ultimately going to come to
11 PROPCO with -- and to OPCO -- and say, "This is a plan that we
12 will be asking you to pursue."

13 So, your Honor, rather than go off and negotiate a
14 cull than come to the debtors and have the debtors say, "That
15 doesn't work for us at all," we were involved in the process.
16 A very commercial thing, your Honor, that they would be
17 negotiating over something that they thought they at least had
18 a chance of convincing us that we should pursue.

19 Your Honor, conflict evidence number three, Dan
20 Aronson's testimony regarding whether it was Boyd or Fertitta
21 Gaming and PROPCO as the stalking horse bidder. This is in the
22 Aronson deposition testimony at page 100, lines 18 through 22
23 and it's the language that Mr. Goldberg quoted earlier. The
24 language is:

25 "Whether or not that transaction was going to be with

1 Boyd or whether or not that transaction was going to
2 be with Fertitta Gaming and PROPCO, the OPCO estate
3 at the end of the day didn't really matter."

4 And then, Mr. Goldberg dramatically repeated, "The
5 OPCO estate at the end of the day didn't really matter."

6 Your Honor, I would submit that what Mr. Aronson was
7 testifying to was that it didn't matter to the OPCO estate
8 whether the stalking horse was Boyd or Fertitta Gaming and
9 PROPCO. We just wanted to pick a stalking horse and get on
10 with the process. Subject to interpretation, I suppose, your
11 Honor, but if you're going to give much weight to that
12 statement, I suggest you take a closer look and think about
13 that alternate reading.

14 That's it, your Honor. That's the evidence of
15 conflicts of interest.

16 And then, we get into the familiar refrains. "The
17 UCC is not being included; we're being disregarded; we want
18 input." Your Honor, again, I'll point you to the Robert Flachs
19 deposition as the degree to which the committee wanted input
20 and wanted to analyze these things in a meaningful way, where
21 Mr. Flachs testified that he did no analysis of any of the
22 excluded assets. That doesn't sound like a committee to me
23 that's engaged in the process of trying to figure out what an
24 appropriate transaction is. And your Honor, I will represent
25 to you that, once again, my repeated invitations to meet with

1 the debtors to discuss these matters went unresponded to.

2 The other conflicts issues argued by Mr. Goldberg
3 were that there are conflicts in the capital structure, there's
4 conflicts due to the master lease structure, there's conflicts
5 that reside with the agent. Your Honor, these lenders --
6 presumably some of them -- invested into this scenario; and
7 presumably, they did some diligence before they did so.

8 Now, we don't know that, because the 2019 disclosure
9 that Mr. Goldberg filed doesn't contain any of the information
10 -- or maybe one piece of information, it does -- but doesn't
11 contain any of the information that 2019(a) actually requires.
12 So, we don't know when they bought their debt. We don't know
13 what they bought it for. I would submit to you that it is very
14 likely that they bought right into this structure.

15 Your Honor, I may be wrong, but there's no smoke
16 here, let alone any fire. And the reason is simple. People
17 are mindful and aware of the multiple roles that they occupy.
18 And people are mindful and aware of fiduciary duties that
19 exist. And you've seen appropriate measures taken throughout
20 the case to deal with those situations. You've seen a special
21 litigation committee to investigate claims. You see
22 independent directors on the PROPCO side and you see the
23 independent director on the OPCO side being put in charge and
24 giving sole and exclusive authority over sale process. These
25 are the kinds of things, your Honor; these are the kinds of

1 measures that are appropriate to mitigate against the risk of
2 potential conflicts that have not manifested themselves.

3 And your Honor, I would also argue that these are not
4 really insider transactions in the nefarious sense that the
5 objectors want to suggest. And here's why. These are multi-
6 party, multi-issue negotiations with a bunch of extremely well-
7 represented parties and extremely sophisticated parties. You
8 urged us early in the case to get in a room around a big table
9 and talk to people and that's what we've done.

10 And ultimately, your Honor, we're coming back to you
11 when we need approval for anything that's outside the ordinary
12 course. And as you've noted a number of times today, for any
13 of this to happen it's got to come through you as part of the
14 plan, as part of the confirmation hearing. We carry a burden,
15 a substantial burden, to prove to you the propriety of the
16 transactions. I'm convinced that we'll be able to do that, but
17 that is our burden. This is not the plan. This is not the
18 confirmation hearing.

19 Your Honor, I think I've addressed this issue at the
20 outset with respect to Mr. Goldberg's argument about the
21 debtors abdicating their responsibilities. I don't want to
22 revisit too much on that, but I think that it is important to
23 note the assets were analyzed. You've got an awful lot of
24 testimony from Mr. Krieger, Mr. Haskins on that. Read
25 Mr. Krieger's redirect if you'd like a nice summary of it.

1 Those issues -- those declarations -- they go to the analysis,
2 the negotiations and the ultimate settlement that came out over
3 the terms -- over the assets.

4 The stalking horse bid decision is, I find, ironic to
5 hear Mr. Goldberg say, "The debtors abdicated their duties with
6 respect to selecting the stalking horse bid." Because if the
7 debtors did abdicate their duties, which I don't think they
8 did, they abdicated their duties under his theory to his agent.
9 It's an interesting argument.

10 And your Honor, the fact of the matter is, we
11 ultimately have the decision about who was the stalking horse
12 bid. The OPCO lenders, the steering committee, the agent, had
13 a large say -- maybe an oversized say. But ultimately, they
14 came to us. We were prepared to deal with it. If it was FG
15 and the mortgage lenders, we were prepared to deal with it and
16 consider it if it were a Boyd bid. They came to us with a bid
17 that they had, that they had chosen; we concluded that was the
18 best alternative; again, handicapped by the fact that Boyd
19 would not engage with the debtors.

20 And at the end of the day, your Honor, the board, led
21 by its independent director Dr. Nave, gave due consideration
22 and made its decisions. And let's think about the inputs that
23 the board looked at when it was considering this. You've got a
24 transaction that has OPCO lender support from a majority of the
25 OPCO lenders, the steering committee and its agent. You have

1 PROPCO lender and mezz lender support on the PROPCO side.
2 That's 100 percent of the creditors on the PROPCO side. As
3 Mr. Qusba indicated, \$3 billion of debt in support of a
4 transaction. Certainly, the board needs to consider the
5 paramount interest of creditors there.

6 You've got an auction process that has now resolved,
7 cleared the underbrush with respect to these miscellaneous cats
8 and dogs excluded assets. So, you've got an auction process
9 where you can now go to bidders and say, "Okay, here's what
10 you're bidding on."

11 You've got a plan underlying all of this -- a game
12 plan, not a capital P bankruptcy plan -- a game plan for
13 separating these two businesses in a way that people have
14 concluded -- the debtors have concluded; OPCO has concluded;
15 PROPCO has concluded -- best preserves the continuity of
16 business and value and jobs for their respective constituents.
17 And I'll be repetitive. OPCO concluded that for OPCO's
18 creditors and constituents; PROPCO concluded it for PROPCO's
19 creditors and constituents. And on the very narrow issue, your
20 Honor, of the IP and the IT, which has become so much the focus
21 of these hearings, both businesses can go and stand up. There
22 is no rip and replace scenario here. So, that's what the board
23 had looking in favor of the transactions before it.

24 The alternatives -- and are the alternatives
25 relevant? You bet they are. I think they certainly are

1 relevant to the board. I think they're relevant to you under
2 the standards that you apply. And you've heard the laundry
3 list of things that would happen. And I think they're
4 absolutely right. Would people see through to settling those
5 issues in some other fashion in some other way? Maybe. But
6 you've got an awful lot of fights to resolve with respect to
7 the litigation over the ownership and lien rights, on systems
8 and other common and shared assets.

9 Again, an aside. The ownership issues, you know, a
10 big deal was made about no prior disclosure. Mr. Nyhan's
11 absolutely right. This business, up until this point, up until
12 the April 19th version of the deal came together, people
13 weren't thinking about how do you really end up pulling this
14 thing apart piece by piece. People had thought about it in
15 broader terms in the December MLCA, but by the time you got to
16 the 19th and it was a reality and we had to figure out how to
17 do it, people had gotten much more granular about what it means
18 to take this thing apart. And there, you've got Haskins'
19 testimony on that at pages 84 and 85 of his deposition.

20 Your Honor, you'd be facing -- I think it's pretty
21 likely you'd be facing relief from stay and foreclosure actions
22 on the PROPCO side. A big part of this deal, as I understand
23 it, from the PROPCO side is that to some extent, this is -- the
24 deal going forward is a bit of a forbearance by the PROPCO
25 lenders, you know. They had said, "We'll take reduced rent for

1 a limited period of time to try to get to a deal." Well, now
2 they've got to a deal. There's something on the table for
3 them. No doubt about it. They want the excluded assets. But
4 if this thing goes sideways and starts to fall apart, whether
5 because you don't approve it today or something else happens
6 downstream, they've more than indicated their willingness to go
7 get their assets.

8 Who knows what you have at OPCO, your Honor.
9 Mr. Qusba said it well, "Who knows what you have without your
10 stalking horse bid here?" Very hard to predict. Multiple cram
11 down plans? I don't know. Has anybody ever seen that before?
12 You've almost certainly got contested cash collateral. You
13 have no certainty on -- no path to solve the Texas put
14 liability.

15 So, are those alternatives you should consider? I
16 think absolutely. I think those all go to all of the factors -
17 - the four factors you look at. Is it a reasonable settlement?
18 What is the prospect in litigation? What's the paramount
19 interest of creditors? I think these things all factor in,
20 because they're costly, time-consuming, very dangerous path to
21 head down. The board certainly considered them. I think Dr.
22 Nave's deposition, some of the citations you've just heard from
23 Mr. Durrer established that.

24 Your Honor, I'm going to drill down into a couple of
25 the more discreet issues. You know, the valuation issue we've

1 kind of gone round and round. In terms of the argument that
2 the assets that are being auctioned needed to be subjected to a
3 full market test before they were market tested, I don't know
4 how many auctions you're supposed to run under Mr. Goldberg's
5 scenario, but it seems to me that where you've got the two most
6 likely bidders -- the now stalking horse bidder and Boyd Gaming
7 -- pitted against each other in pretty heated bidding, I think
8 that counts as your pre-auction. I think you get to count that
9 as the pre-auction. I don't know how many more times you have
10 to go through that.

11 The cases he cites on this are not even close to
12 these facts or really even close to what he cites them for.
13 The *Blixeth* case, there a trustee proposed to sell some real
14 estate for an \$8 million credit bid from a secured lender. The
15 only evidence the trustee had on value on which the purchase
16 price was based was the appraisal of the property that was in
17 the file at the lender's office. The lien that the lender was
18 purporting to credit bid was actually disputed by other
19 creditors in the case and the trustee proposed to limit notice
20 of the sale only to parties who were already participating in
21 the case as stakeholders.

22 Your Honor, no public auction, no concept, no idea,
23 no conception of a public auction there. Clearly an
24 intercreditor dispute; a trustee who didn't have much money to
25 do anything other than say, "I'm going to sell it to the first

1 guy who makes me an offer." Not this case.

2 The *Biderman* (phonetic) case, your Honor, a lot of
3 bad facts in that one. Probably the key one, though, was that
4 the MOU under which the proposed leverage buyout was to be
5 sponsored actually contained a no shop, which prohibited the
6 debtor from encouraging, soliciting, seeking any other bids.
7 Again, no public auction contemplated. Almost the antithesis
8 of the situation we have here.

9 Your Honor, on the smaller point -- kind of a smaller
10 valuation issue -- you have a separate auction for the excluded
11 assets. Why, your Honor? Why would you value those assets
12 when you have a negotiation between probably the only party
13 who's interested in buying them? And the seller. You've got
14 testimony in the Krieger and Caruso depositions that these are
15 not likely assets that have much, if any, value to other
16 buyers. And to the extent they have value, that value is more
17 than captured by the \$35 million and additional consideration
18 flowing to OPCO.

19 And your Honor, it is important -- and I will repeat
20 -- to remember. This isn't \$35 million for specified assets.
21 OPCO gets a lot under this agreement. The \$35 million, yes;
22 the \$13 million working capital assumption, yes. You've got
23 the stalking horse bid of \$772 million that gets locked in
24 under this proposal that otherwise is not there. You've got
25 the certainty when you go to auction that you can deliver the

1 assets you're promising to deliver and that you can deliver a
2 buyable standup OPCO business. You've got certainty with
3 respect to the Texas put liability. You've got no actual --
4 you've got the additional rent reduction and no actual
5 rejection now, which would trigger a transition, as you've
6 heard. And you've got potential compensation for extended
7 transition later.

8 And then, your Honor, you've got a provision in the
9 master lease compromise agreement, which I cited to you in my
10 opening argument. It's paragraph EE and it's transition
11 support for OPCO purchaser. And I'm not going to read it. I
12 actually read it into the record, or portions of it, last time.
13 But essentially it says PROPCO is going to obligate itself and
14 contractually bind itself to support consummation of an OPCO
15 sale to a third party bidder and will provide and cooperate in
16 orderly transition, including getting the IT systems split
17 apart and stood up. Huge benefit, your Honor, on the OPCO side
18 debt our objectors choose to ignore.

19 Your Honor, the MLCA -- I'm trying to wrap up this
20 portion -- you know, the argument is really the same we've
21 heard back from Mr. Goldberg back in December. It's quite a
22 bit of deja vu. Mr. Goldberg would argue OPCO has leverage
23 over PROPCO because OPCO can do great harm to PROPCO and OPCO
24 should exercise that leverage. Put another way, PROPCO isn't
25 paying enough because PROPCO would have to pay more to buy

1 similar assets elsewhere. Your Honor, that is legitimate
2 leverage that exists. It's been exercised. That's why the
3 list of things I've just described to you were obtained by OPCO
4 in the negotiations.

5 And your Honor, I think, you know, you've said it and
6 I think it's the same concept that everybody has kind of
7 struggled with here, which is what is the value to OPCO? Now,
8 Mr. Goldberg would have you believe that the value to OPCO is
9 whatever PROPCO would pay and on an economic theory PROPCO will
10 pay up to one dollar less than it would have to pay to go out
11 and acquire all of the assets elsewhere.

12 Your Honor, the problem with that and it's an
13 economic theory that's interesting, the problem with it is that
14 OPCO -- if you flip that and you turn it on OPCO -- then OPCO
15 should accept whatever number is a dollar more than OPCO could
16 obtain, if it went out and tried to sell these assets somewhere
17 else. Somewhere in that wide range, your Honor, is a
18 settlement. I think that, frankly, is the range that sets the
19 range of reasonableness, as you think the outer boundaries of
20 the range of reasonableness as you think about this.

21 You asked about, you know, you mentioned -- observed
22 -- that there's no fair market value testimony. Well, your
23 Honor, there's no market. OPCO's market is PROPCO. You've got
24 evidence from Mr. Friel, from Mr. Krieger, from Mr. Caruso,
25 from Mr. Genereau; you've got testimony to that effect.

1 A couple of discreet points, your Honor, with respect
2 to the assets. On the systems, assume we understand the
3 argument that you should basically stare down PROPCO and say,
4 "Go buy it elsewhere or pay more to me. If you think you can
5 get it cheaper, go buy it elsewhere." The problem with that is
6 -- and that's a perfectly legitimate negotiating position --
7 the problem with that is it ignores the fact that what does
8 OPCO do? What does OPCO do when PROPCO says, "Okay. That's
9 what I'm going to do"? OPCO has to figure out a way to get two
10 servers off of PROPCO properties, climate controlled
11 environment for 12 years running continuously; get them out of
12 there; put them on a flatbed; truck them across town; find a
13 place to put them; turn on the air conditioning; plug them in
14 and see what happens. Good luck.

15 Your Honor, we talked about this a little bit in
16 December: What does leverage mean? Leverage means you've got
17 to have some basis and rationale for taking that position.

18 Your Honor, the primary customer information:
19 Mr. Nyhan actually articulated this very well so I don't want
20 to spend a lot of time on it. But, you know, the bottom line
21 is that the assumption made by the objectors here is that an
22 OPCO buyer will find value by poaching PROPCO from PROPCO's top
23 25. And that's based on a couple of assumptions. It assumes
24 OPCO and PROPCO are direct competitors. They're not.
25 Mr. Krieger testified as much. And it makes sense if you think

1 about it. Why would the Station entity as a combined entity
2 build casinos that were direct competitors with each other?
3 Mr. Krieger has good testimony about kind of concentric circles
4 of geographic areas that you try to cover strategically.

5 So, if OPCO and PROPCO are not direct competitors,
6 sure, there's probably some migration, some play, and people
7 move back and forth a little bit, but they're not direct
8 competitors. And having the PROPCO customer list of their top
9 25, you're not likely to be able to do much with that.

10 If you're Boyd and you've got properties that are
11 direct competitors with PROPCO properties, it's a completely
12 different story, very valuable, because you can go in and try
13 to gut your main competitor's business.

14 Your Honor, other bidders don't see it that way.
15 Exhibit 34 is an indication of interest from another potential
16 bidder whose analysis of this issue basically leads them to the
17 conclusion that they are skeptical of the value of the PROPCO
18 customer list to an OPCO buyer.

19 And your Honor, we also do, I think, have to deal
20 with the scenario that the bid procedures contemplate that
21 folks can and may well bid for less than all of these assets.
22 Now, if I'm someone who's interested in coming in and buying
23 two, three, four of these casinos and I want to make a bid, but
24 I know that someone else in the auction has the ability to come
25 in and purchase the customer information from the top 25

1 percent of my customers, it's going to have a big effect on
2 whether I bid and at what level I bid. Your Honor, that is
3 precisely why we set it up the way we did.

4 Your Honor, on employees, there's something about
5 Mr. Winston repeating, "When you buy a business you get the
6 people," that sits wrong with me. I don't know in what market
7 you buy people, but it's no markets I reside in. But what, you
8 know, what he's really arguing and it really does come down to
9 the situation of you boil down -- if you want a third party
10 buyer to choose who they want -- to be able to choose who they
11 want and keep them, which is his premise, then you get to the
12 question of how can you force the employee to stay with the
13 bidder?

14 And the answer is they can assume the employee
15 agreement, I suppose, and thereby continue to keep the non-
16 compete in effect in some fashion to whatever extent it's
17 enforceable. And then, you force the non-compete when they
18 say, "You know what? You're not the folks I came to work for.
19 I came to work for somebody else. I'm going to go find
20 something else to do." And then the bidder says, "Oh, no, you
21 don't. I've got a non-compete. I'm going to keep you here."
22 No matter how you look at this issue, it comes down to the same
23 point which is you are ultimately trying to block employees who
24 don't want to stay from going and taking other employment.

25 Wild, Wild West, your Honor, you asked the question

1 in Mr. Haskins' testimony; your question was, "When is that
2 option exercisable?" It's actually exercisable at the end of
3 2010. I know that was a question that you had. I don't have
4 the cite to the Haskins' testimony, but it's in there.

5 The reality is, your Honor, the restructuring --

6 **THE COURT:** At the end of this year?

7 **MR. KRELLER:** The end of this year. I believe
8 payment would be due in 2011. But the reality is, your Honor,
9 we will either -- even if we march along the time table that
10 we've set here, that's going to be a challenge to even have the
11 restructuring close and the plan effective by the option comes
12 due.

13 **THE COURT:** When is there going to be a signed,
14 binding agreement from the lessor regarding the treatment
15 (indiscernible)?

16 **MR. KRELLER:** Your Honor, I was speaking to Wild,
17 Wild West.

18 **THE COURT:** I know, but I'm thinking of the other
19 one.

20 **MR. KRELLER:** But if you want to switch to the Texas
21 put, there is one. That agreement is in place.

22 **THE COURT:** I haven't seen it.

23 **MR. KRELLER:** You have not, your Honor. It's not an
24 agreement to which the debtor is a party.

25 **THE COURT:** Is there an agreement?

1 **MR. KRELLER:** We can certainly file that and describe
2 it in the disclosure statement. I think Mr. Qusba can --

3 **THE COURT:** I would like it filed, just so there's no
4 question about that.

5 **MR. UNIDENTIFIED:** We can file it, your Honor.

6 **THE COURT:** Thank you.

7 **MR. KRELLER:** But we can certainly do that, your
8 Honor.

9 **THE COURT:** Because that was raised and let's clear
10 that up. I would, once again -- I'll be honest with you -- it
11 wasn't a great concern of mine because you've come to this
12 Court and asked this Court to make a ruling based upon an
13 agreement that you ultimately don't sign, you're going to have
14 a serious problem. So, I would expect that it would be signed
15 and I didn't see that as a major obstacle.

16 **MR. KRELLER:** Thank you, your Honor. Your Honor,
17 Ms. Steingart likes to argue about how easy it would be to blow
18 away the change of control provision in that lease. Even if
19 she's right -- and I'm not so sure she is -- even if she's
20 right, that leaves you with a lease with Mrs. Fertitta at what
21 is probably above market rent. So, that's one where -- that's
22 a fight where you figure out whether you want to win it or not.

23 What the resolution provides is that a bidder knows
24 that it doesn't have to deal with the uncertainty of a
25 bankruptcy filing, a 365 fight, and it doesn't have to deal

1 with the uncertainty of, "Do I have a lease? Do I have a put?
2 Do I trigger a put that I have to pay later at some bigger
3 amount?" A bidder can look at it and say, "You know what? I
4 can put this away for \$75 million and I own the fee. I own the
5 fee interest in the land at 75 and I'm done." So, it's not a
6 restriction on assignment of the lease. It's actually an
7 opportunity to purchase the land.

8 Your Honor, on the master lease compromise, again,
9 the bottom line is this is about leverage. They wish they had
10 more. We wish we had more. We have what we have. It got
11 negotiated and we think we got an awful lot for it. They've
12 got no evidence on their side to support the notion that more
13 could have been gotten. They didn't even bother to try to
14 analyze the value of the assets through their financial advisor
15 clicking away \$200,000 a month and not analyzing things. These
16 are not their assets. They don't have liens on them. Many of
17 these assets, as Mr. Qusba pointed out -- or probably the bulk
18 of these assets -- reside at subsidiaries where they don't even
19 have claims -- the committee that is. Mr. Goldberg's in a
20 different situation.

21 Your Honor, on the bid procedures, we've been through
22 these in some detail. First of all, obviously, we've heard you
23 and are not surprised in terms of what you've had to say about
24 dates -- changes in the dates are already under works, the
25 various dates and deadlines. We didn't have the firm dates of

1 hearings and auction and everything until we sat down with you
2 this morning. Those agreements will be modified appropriately.

3 The asset purchase agreement was executed by the
4 buyer late yesterday. We will file that, as well.

5 I don't want to belabor the arguments about Dr. Nave
6 other than to note that Ms. Steingart argues that there's no
7 evidence that Mr. Nave can distance himself from the Fertittas.
8 I would argue that she has no evidence that he is anything
9 other than independent and has acted independently.

10 Your Honor, I think in the revised bid procedures we
11 tried to be clear. I'll just read you the relevant provision
12 in B-3.

13 "For all purposes under these bidding procedures, Dr.
14 James Nave shall have the sole and exclusive
15 authority to act on behalf of the OPCO debtors and to
16 direct the actions of other representatives or
17 advisors of the OPCO debtors."

18 If there is a clearer way to say it, your Honor, I
19 welcome it.

20 Your Honor, you've clearly read the revised bid
21 procedures. I don't want to delve into areas that you don't
22 need to hear more about and so I'm not going to. If you
23 have --

24 **THE COURT:** Did you hear my comments earlier when we
25 went through the bidding procedures?

1 **MR. KRELLER:** Your Honor, I did. I did. And I've
2 marked the places where I think you indicated that things can't
3 happen without your approval.

4 **THE COURT:** Correct. What do you have? Let's make
5 sure we have the same thing.

6 **MR. KRELLER:** Your Honor, I have in P-1 --

7 **THE COURT:** I'm sorry?

8 **MR. KRELLER:** P-1.

9 **THE COURT:** P-1.

10 **MR. KRELLER:** P as in Peter, one.

11 **THE COURT:** Yes, sir.

12 **MR. KRELLER:** The changes to the bidding procedures
13 where we had "without further notice" -- I have that as being
14 subject to Court approval.

15 **THE COURT:** Correct.

16 **MR. KRELLER:** I have in R-1(e) --

17 **THE COURT:** Yes.

18 **MR. KRELLER:** "Any additional auction rules" -- I
19 think that's subsumed in your oversight. But I'm happy to
20 insert that -- of the actual auction.

21 **THE COURT:** It said -- my concern was that it says,
22 "The OPCO debtors, under the direction of Dr. James
23 Nave, after consultation with the consultation
24 parties, (indiscernible) announced that the auction
25 additional procedural rules that are reasonable under

1 the circumstance conducting the auction, provided
2 that they're not inconsistent with the bidding
3 procedures, the Code -- or order of the Bankruptcy
4 Code -- and disclosed to each qualified bidder at the
5 auction."

6 My point is I think that that should be requested of
7 the Court and have the Court make a decision --

8 **MR. KRELLER:** Right.

9 **THE COURT:** -- what the rules will be.

10 **MR. KRELLER:** I agree with that, your Honor. All I
11 was commenting on was that because those happened at the
12 auction, I assumed that was -- that all falls under your
13 authority.

14 **THE COURT:** I just want --

15 **MR. KRELLER:** But the language will be in.

16 **THE COURT:** Thank you. Then there was T -- I had
17 initialed a "T." I don't know that we discussed it.

18 **MR. KRELLER:** I don't have T marked, your Honor, so I
19 apologize if I missed the --

20 **THE COURT:** It said, "The sale hearing may be
21 adjourned or rescheduled by the OPCO debtors without further
22 notice..." No. You'd have to ask me.

23 **MR. KRELLER:** That's certainly --

24 **MS. STEINGART:** T as in Tom, your Honor?

25 **MR. KRELLER:** T as in Tom.

1 **THE COURT:** T-1 on page 18, Ms. Steingart. It says,
2 "The sale hearing may be adjourned or rescheduled by the OPCO
3 debtors without further notice by an announcement of the
4 adjourned date of the sale hearing." No. You can request a
5 continuance and I'll make a determination.

6 **MR. KRELLER:** How about, "Adjourned or rescheduled by
7 the Court," your Honor?

8 **THE COURT:** That's correct. I don't have a problem
9 if you don't -- then I've got a question regarding the
10 remainder of this. It says, "If the OPCO debtors do not
11 receive any qualified bids in addition to the stalking horse
12 bid, the OPCO debtors shall proceed as set forth in the no
13 additional qualified bid section."

14 I know that you've got a very good process here, or
15 at least a process to determine qualified bidders. My question
16 to you would be what do we do when this happens? I call tell
17 you the *Debbie Reynolds* case and others where all of a sudden
18 you get an appearance at the auction by someone who would
19 otherwise be a qualified bidder under your own rules and nobody
20 likes postponing, adjourning, serial hearings. *Debbie Reynolds*
21 is actually a great example of the difficulties that arise in
22 that situation and for the appeals that come thereafter.

23 And it's always difficult, candidly, for the Court.
24 And I assume it's difficult for particularly the debtor in
25 possession when the obligation is to maximize the value of the

1 assets. I am extraordinarily reluctant to turn away anybody
2 who might be qualified.

3 I will set strict rules. Some of your local counsel
4 may have told you this. I was selling a ranch and I had all
5 these folks that said, "We want to buy it. We want to buy it."
6 So, I said, "Fine. The stalking horse has got \$300,000.
7 You're going to need \$300,000 plus the \$300,000 overbid and
8 it's non-refundable and you need it now."

9 "Okay." And they deposited it. And the rest of
10 their financing didn't come through and then they came in to
11 get their \$600,000 back. And I said, "No." I mean, so they
12 lost \$600,000. The point being is that I think that we're
13 capable of dealing with someone who shows up at the hearing who
14 would otherwise be qualified. I don't want to encourage it.
15 That's not the point. But I want to deal with the potential
16 contingency.

17 So, I just -- in this, I think that you could
18 announce that there are no qualified bids and I think I would
19 want to reserve the ability to see if anybody was present at
20 that auction that would consider themselves to be a qualified
21 bidder and then could establish that to my satisfaction. It's
22 a difficult thing.

23 **MR. ARONZON:** Can I ask a question, your Honor?

24 **THE COURT:** Sure.

25 **MR. ARONZON:** If there are a number of qualified bids

1 and the auction runs in accordance with its rules, you're not
2 suggesting that someone then could just ignore those rules and
3 show up?

4 **THE COURT:** No, I'm not at all.

5 **MR. ARONZON:** Okay.

6 **THE COURT:** What I'm saying is if you tell me you
7 don't have any qualified bidder, but somebody's there then.

8 **MR. ARONZON:** Okay.

9 **THE COURT:** And all of a sudden they say, you know,
10 "Judge." Maybe Exhibit 34 guy shows up and says, "I got a
11 billion." I'm not going to turn him away.

12 **MR. ARONZON:** I've had this fight before and the
13 rules are there for a reason. And we like them enforced so
14 that we know what we're doing.

15 **THE COURT:** If there are qualified bidders, I'll
16 enforce the rules and they should play by the rules. If there
17 are no qualified bidders and somebody shows up and they have --
18 look. I'm just not going to let somebody show up and just say
19 they disregarded the rules. We'll listen to them. I want to
20 be able to consider it and then I'll make, I would hope, an
21 informed decision based on their ability to bid at that time.
22 I just don't want to be foreclosed from that exercise of
23 discretion.

24 **MR. ARONZON:** I appreciate the clarification.

25 **THE COURT:** So, that was T.

1 **MR. KRELLER:** Well, your Honor, as I interpret it,
2 your question was, when you said, "What will we do at..." -- I
3 think that was the question. What will you do?

4 **THE COURT:** Yeah.

5 **MR. KRELLER:** Your Honor, and just from purely
6 drafting, I guess, at the end of that sentence, comma, "unless
7 the Court orders otherwise"?

8 **THE COURT:** That will work. But I wanted everybody
9 here to understand that is not an open invitation. And it is
10 not. I follow the rules. That's why I have some difficulty
11 with the *Fitzgeralds* case, for example, where nobody followed
12 the rules and the judge got reversed.

13 The judge should have just said, "No, I won't listen
14 to anybody," then, I guess, she would have been okay. That
15 case befuddles me, especially footnote 12; since footnote 12
16 talks about *Espinosa* and statutory requirements and then it
17 says, "Perhaps also decisional," and the only decision that
18 it's talking about is a BAP decision and which the last time I
19 checked BAPs aren't precedential. So, I consider that kind of
20 a bootstrap footnote.

21 I did read the case. And the case that it relied
22 upon, *Suter versus Goddard* (phonetic) was this Court's
23 decision. And the district judge said that the appeal was
24 moot; got reversed by the Ninth Circuit. Then, the process
25 that I utilized to approve that settlement was affirmed because

1 I did a combination 363 and 9019. That was actually, I think,
2 around Mickey Thompson. So, I'm fairly used to doing these
3 things. Settlements in those type of sales are always
4 difficult and in that case particularly difficult because
5 you've got somebody buying their way out of a lawsuit. So,
6 that always makes it really heightened scrutiny.

7 So, I am satisfied. Let me see here, X; I'd looked
8 at X. This is your client's reservation of rights. I don't
9 have any problem with A, B -- because I would ask the parties,
10 especially the consultation parties, what they thought was the
11 highest and best offer. And then, I'll make the determination.
12 So, that to me is beneficial. I may reject any time a bid that
13 is inadequate or insufficient. That doesn't really bother me,
14 because there's no doubt in my mind that any legitimate offer
15 will be considered. And, of course, anybody who thinks that
16 that discretion has not been properly exercised would probably
17 be there and I could listen to them in any event.

18 I don't know what C and D and E add to the process.
19 "May impose additional terms and conditions or otherwise modify
20 the sale procedure"; no way. Not after going through all of
21 this work. You can request to modify and it'll be up to the
22 Court. There may be circumstances that change. There may be
23 financing. There may be a lot of issues. I don't know what
24 could occur, but I think the determination must be made by the
25 Court and not by the debtor.

1 **MR. KRELLER:** That's fine, your Honor. I was
2 actually trying to --

3 **THE COURT:** And I'm not going to allow a withdrawal
4 at any time. I think you've got to come here and tell me why
5 and then you've got to ask me to allow that to happen. After
6 all the money that's been spent; after all the time that's been
7 put in; after all the depositions that have been taken; no.
8 I'm not going to do it that way.

9 And "reject all bids"? You're going to have to tell
10 me why you've rejected all bids. Because if I read that
11 correctly, that means also rejection of the stalking horse bid;
12 and once again, I'm going to want to know why before I allow
13 it.

14 **MR. KRELLER:** So, your Honor --

15 **THE COURT:** Because rejecting that bid may, in fact,
16 trigger certain ramifications under either the transitional
17 service of transfer events and I'm not going to let that occur
18 without my review. So, that's got to be worked out a little.

19 **MR. KRELLER:** Your Honor, is it sufficient to say
20 that all of those -- C, D and E -- are all subject to Court
21 approval?

22 **THE COURT:** With seeking Court approval and obtaining
23 it. Seeking and obtaining. I want to know. And the reason I
24 say that is I want you to actually ask me and not have me raise
25 it sua sponte. That's what I want to avoid.

1 **MR. KRELLER:** Understood, your Honor. I understand
2 that clarification.

3 **THE COURT:** I think I could. I don't have any --
4 take a look at *Beavo* (phonetic). I think I could. There's no
5 question about it, but I'd rather not have that issue arise.
6 Otherwise, those are my concerns and you heard the concerns --
7 I've heard the concerns by the objectors. But those are my
8 concerns of the bidding procedures.

9 **MR. KRELLER:** All right, your Honor. We'll make
10 those clarifications. The only other thing, just so you know I
11 had noted was from Mr. Nyhan's comments, clarifications around
12 the \$35 million number being a number that it is zero or 35,
13 nothing in between.

14 **THE COURT:** Yes. That has to be clarified. I think
15 I mentioned that. It's not a reduction based upon what's
16 actually transferred. If one item's transferred, it's \$35
17 million.

18 **MR. KRELLER:** Your Honor, that's all I have on the
19 bid procedures.

20 Briefly, on the support agreement -- the OPCO support
21 agreement and I wholeheartedly agree with your assessment of
22 that agreement as basically an LOI. I've described it to other
23 courts as really a deal tool that allows parties to kind of
24 look at each other and make sure they're moving kind of at the
25 same pace and in the same direction. And the recourse tends to

1 be that if you're not and one party decides to go slower,
2 faster or a different direction, the support agreement blows up
3 and they're all free -- and everybody's free to go their own
4 way. And that's how we view this.

5 You know, you asked the question, "Why? Why do you
6 need to approve it? Why does OPCO want it?" Your Honor, I
7 think the answer is simple; maybe not terribly satisfying, but
8 in the context of this kind of a deal, it actually, I think,
9 becomes pretty meaningful where you've had so much acrimony and
10 so many different views on different issues. And the answer is
11 because it enhances our ability as debtors to maintain the hard
12 fought peace that we've achieved at this point with our OPCO
13 lenders.

14 And it's not just about trying to lock people into a
15 particular plan. Remember that the OPCO lenders control things
16 like cash collateral and whether subsidiaries can continue to
17 stay out of bankruptcy and under forbearance. This also builds
18 an orderly separation, as we've talked about. And it also
19 tells the market -- and I think it tells bidders, frankly --
20 that the sale process is going forward consensually and that
21 this is being done with the support of the folks whose
22 collateral these assets are.

23 And it's at little or no cost to the OPCO estate
24 because, frankly, as I've said before, on the OPCO side it's an
25 agreement to do things that we are already doing; that we've

1 already negotiated for and that we would be doing as the right
2 thing to do in the right way to maximize value.

3 On the issue of whether it's an illegal solicitation,
4 you know, clearly we don't believe so. As Mr. Qusba noted,
5 there's not even a plan right now that reflects where we stand
6 today that we could be soliciting folks on. This is
7 negotiation. It's a negotiating tool. There's an awful lot of
8 wood to chop before we get to a plan that we can actually
9 solicit votes on.

10 Your Honor, I just wrap up by saying again, this
11 isn't the confirmation hearing. These are significant motions,
12 no question about it, and they're difficult issues to deal
13 with. But at the end of the day, we're talking about bid
14 procedures and establishing a process. And I think that's
15 something we're capable of to conduct a fair auction.

16 And we're talking about a master lease compromise
17 agreement that's an incremental build on something that's
18 already been approved and rights have already been vested. But
19 it's also a facilitator for that auction so that we can provide
20 clarity to bidders. It creates and helps create the platform
21 on the PROPCO side for the separation that both of these
22 businesses need.

23 And keep in mind, as I said in the opening, it's not
24 a separation only because there may be a sale to a third party.
25 It's a separation that the lenders, as exit financiers, are

1 mandating because they want collateral packages that stand
2 alone when they enter into and give this financing to these two
3 businesses.

4 I think you've got ample evidence in the record from
5 the debtors and also from the other entities that support the
6 motion to support the findings you need to make here. I think
7 you've got a very reasonable settlement in front of you for
8 approval under all the four factors that you need to analyze.

9 And the bid procedures, again, are really just
10 procedural. And if you're comfortable -- and it sounds like
11 you are -- at this point with the modifications and your
12 clarifications, that that will set up a fair process going
13 forward; then I think they're both suitable for approval.

14 **THE COURT:** Thank you.

15 **MR. KRELLER:** Thank you, your Honor.

16 **THE COURT:** Thank you, counsel. It's been a long
17 day. Ms. Steingart?

18 **MS. STEINGART:** Your Honor, (indiscernible) you know,
19 we expected to have very, very (indiscernible). I'd like to be
20 able to respond to Mr. Kreller and Mr. Kreller has been able to
21 respond to us.

22 **THE COURT:** They have the burden. They went first.
23 They went third. You went second. That's generally how it
24 goes. I'll give you 15 minutes.

25 **MS. STEINGART:** Thank you, your Honor. If I use

1 all --

2 **THE COURT:** And no more. I mean, we will end at 8:00
3 o'clock. If you're in the middle of a sentence, it's sort of
4 like the red light in an appellate.

5 **MS. STEINGART:** Understood.

6 **THE COURT:** That's it.

7 **MS. STEINGART:** Understood, your Honor. To start
8 with, the fact that PROPCO and Fertitta Gaming did a mating
9 dance before they came to the PROPCO agreement does not
10 legitimize the kinds of things that they're asking for at this
11 point.

12 Mr. Qusba talks about his \$3 billion in credit that's
13 supporting him. Well, we have two and a half billion dollars
14 of bond debt. And this is real money that was invested before
15 all these machinations of sending PROPCO assets down and we
16 have approximately \$225 million. So, we're talking --

17 **THE COURT:** Excuse me. Invested when?

18 **MS. STEINGART:** I'm sorry?

19 **THE COURT:** Invested when?

20 **MS. STEINGART:** It was invested before 2007, your
21 Honor. So, when people say that we bought into systems or
22 bought into structures, that is just absolutely not the case.

23 So, that's two and a half billion dollars that are
24 against what's going on here, plus the amount that Mr. Goldberg
25 has. So, we're about \$3 billion and \$3 billion, you know, so

1 there's not a, you know, a sort of ocean of support on one side
2 and nothing on the other.

3 **THE COURT:** There is a distinction between the
4 secured and unsecured nature of those obligations.

5 **MS. STEINGART:** I do understand there's secured and
6 unsecured, but there are opportunities here for bids to exceed
7 the secured --

8 **THE COURT:** I understand your point.

9 **MS. STEINGART:** You know, we really don't care about
10 the Caruso report. The point is that there's no proof of
11 value.

12 As to plan support, there's no reason for OPCO to be
13 part of that plan support agreement. To the extent that it's
14 an agreement to work in good faith towards a term sheet, as the
15 Court has pointed out, the debtors already have an obligation
16 to work in good faith towards a term sheet. This will bind
17 them to work towards that term sheet.

18 And I think, your Honor, it's premature to do that.
19 They have a restructuring term sheet. They can work towards
20 that, but for them to be bound by agreement -- because it is an
21 agreement. It is an agreement that's being approved by this
22 Court and there's really nothing that is in dispute among the
23 parties to that ostensible agreement. There is no dispute
24 among OPCO and Fertitta Gaming and the OPCO lenders about
25 anything. There's no 9019; there's nothing that's being

1 resolved there.

2 As to the Texas put, if what people are telling us
3 here is there's some agreement to which the debtor is not a
4 party, that's not going to be binding on the debtor. That is
5 not going to be binding on anyone who takes that property. I
6 couldn't care less about it. What Mr. Aronzon or Mr. Qusba
7 told you is that the debtor is not a party to that agreement.

8 **THE COURT:** Okay. I get that. I see your point.

9 **MS. STEINGART:** All right. They told you that with
10 respect to the Texas --

11 **THE COURT:** You mean the agreement signed by the
12 lessor.

13 **MS. STEINGART:** Right. They said that there is an
14 agreement; that it is signed; that it's not in the court, even
15 though it's in both these -- it's in the master lease
16 compromise and it's in the OPCO term sheet. If the debtor's
17 not bound, then the debtor's not bound. I couldn't care less.
18 It shouldn't be in those documents.

19 **THE COURT:** Go ahead.

20 **MS. STEINGART:** So, that's another important issue.

21 Under the current MCLA (sic), you know, Mr. Nyhan
22 gave the Court the impression that, "Well, what the current
23 MCLA provides is that if I agree with OPCO, I get it for that
24 price. I only come to you if I can't agree. Uh-uh. What the
25 current MCL says is that they have to pay for the assets. And

1 if they came to this Court and said that they wanted an
2 agreement approved for the assets where they were trying to
3 transfer them at a price without coming here, your Honor, you
4 would hear from us. Because it's still a 363 sale and even
5 though they've agreed to sell it to one party, it doesn't mean
6 they don't have to come here and get approval for that number.

7 Which leads us to the most important point here, your
8 Honor. The auction cannot go forward until there is an
9 appropriate price for the excluded assets. Everyone who has
10 stood before you today has admitted that whatever the number is
11 now, it's not the number they're worth. And it's not the
12 number they're worth because there are alleged other benefits.
13 We don't think the other benefits exist. But if you're going
14 to have an auction, and you're going to make someone pay the
15 exact amount as someone who gets the excluded assets minus 35,
16 but they're worth 50, you're not going to have a fair auction.

17 And they say that, "Well, you know, we need to have
18 the stalking horse bid. We need to have it now." Well, the
19 APA says you don't have it until June 21st and even after June
20 21st -- even after June 21st -- there are a large number of
21 outs.

22 So, I don't know what we have here and to the extent
23 that they say without it, you know, you have to have the master
24 lease compromise, too, because we have no stalking horse. We
25 have to sell at 35, even though 35 is the wrong price, because

1 we're not going to have the stalking horse. The stalking horse
2 is entitled to it, because they're entitled to a break-up fee.

3 We provided the Court with cases that show that when
4 an insider is a stalking horse and it's attached to one of the
5 affidavits -- I don't remember which one now, your Honor --
6 when an insider is a stalking horse, there is generally no
7 break-up fee.

8 **THE COURT:** I think I already commented on that
9 earlier.

10 **MS. STEINGART:** Right. And, in addition, when
11 there's competition to be a stalking horse, as in the most
12 recent *ESH* case that we provided to you, your Honor, there is
13 no break-up fee. So, to the extent that the stalking horse
14 says, "I need these things to be the stalking horse" --

15 **THE COURT:** I generally don't award break-up fees in
16 cases until after the auction, so I can determine that there's
17 actually been a benefit brought, because that should be the
18 basis of the break-up fee.

19 **MS. STEINGART:** So, the point here is, your Honor --

20 **THE COURT:** That's my understanding.

21 **MS. STEINGART:** The point here is, your Honor, why;
22 why should the entry into the MCL2 and the \$35 million price be
23 seen, as Mr. Nyhan says, the benefit of his bargain? He's not
24 entitled to that as a stalking horse. And the Court shouldn't
25 give it to them.

1 The MCL2 now is still a toxic agreement. It creates
2 a lot of consequences without actions of OPCO. At this point,
3 it should be at plan confirmation. No one here wants to see a
4 rejection of that lease. The parties will cooperate to extend
5 the current agreement, because it's in everyone's interest to
6 do so.

7 I'm going to leave some time for Mr. Winston, but,
8 you know, I sort of would like to put it -- we have the lawyer
9 for the Fertittas here in the courtroom -- and I thought it
10 would be interesting to put it to them. Is he going to tell
11 this Court that the Fertittas will not bid or participate or
12 withdraw the number that they have on the table if this Court
13 does not approve the MCL2 or determines that because there's no
14 value --?

15 **THE COURT:** Do you think it's appropriate for a Court
16 to ask for a stipulation from counsel before counsel's had or
17 has an opportunity to confer with their client? I think -- I
18 don't think it's proper to offer a stipulation until you talk
19 to opposing counsel first. So, I'm not going to do that.

20 It might be interesting, but I just don't think it's
21 appropriate. I understand your point.

22 **MS. STEINGART:** Right. Well, at this point, your
23 Honor, we do believe that the quid pro quo for the stalking
24 horse is really inappropriate and certainly is a diminution
25 with respect to the value of OPCO and is a forfeiture of value

1 from creditors to an insider of the company.

2 And given the fact that we don't know if we have a
3 stalking horse bid for a number of weeks from now, there's
4 really no impediment to putting a process in place where the
5 Court can get a reliable set of values for these assets so that
6 the bid can go ahead.

7 Just one last thing as to what happens under the bid
8 procedures with respect to the PROPCO option. First of all,
9 there's nothing currently in the procedures that says PROPCO
10 gets to cherry pick among the excluded assets. I mean,
11 Mr. Nyhan said, Mr. Kreller said, "I can't have an auction if I
12 don't know what I'm auctioning."

13 Well, but we don't know what they're auctioning,
14 because we don't know if PROPCO is going to take the excluded
15 assets if the stalking horse doesn't win. Not only don't we
16 know if they're going to take it, we don't know which ones
17 they're going to want if they decide to take some and not all.
18 There's nothing here that says -- and there's nothing anywhere
19 else that says -- they get to pick and choose. They either
20 take the basket or they don't take the basket.

21 **THE COURT:** When you went through and discussed the
22 optionality, was it your position then that the choice was two:
23 all or none? Is that what you're saying?

24 **MS. STEINGART:** I think that what this says is all or
25 none. That's number one. Number two is, with respect to the

1 credit that's being given to the person who has to bid the
2 price, assuming they'll get it, it says \$35 million, your
3 Honor. It doesn't say 35 plus 13. It doesn't say --

4 **THE COURT:** No. It's a \$35 million credit.

5 **MS. STEINGART:** It's a 35 --

6 **THE COURT:** But they get -- all right.

7 **MS. STEINGART:** Yeah, I don't know what's happening
8 to that other basket of liabilities --

9 **THE COURT:** To the 13?

10 **MS. STEINGART:** -- so I don't know what people get or
11 don't get.

12 **THE COURT:** I thought I did. But that's okay.

13 **MS. STEINGART:** Okay. Thank you, your Honor.

14 **THE COURT:** Congratulations. First lawyer in 15
15 years that did it shorter than I allowed. Thank you.
16 Actually, that's not true.

17 Okay. It's been a long day. Nobody's had dinner.
18 My staff's been here for quite a while. I need some time to go
19 through my notes. I want to review some of the exhibits and
20 deposition testimony. What I need to know is if -- all I'm
21 going to do tomorrow is go through and try to orally put my
22 findings and conclusions on the record. I may ask some
23 questions, because I'm sure -- as I said, these are my notes
24 that I've already prepared. Most of the questions that I had
25 here to be asked have been answered by you all and I appreciate

1 it because it was good argument.

2 I'm trying to find out what time you folks need to
3 get out of town. Not that we don't love you. But I'm trying
4 to accommodate counsel here to a certain degree. I like to
5 start at 10:00 so I have enough time to really get ready. Is
6 that a problem for anybody?

7 **MR. QUSBA:** Your Honor, I'm going to defer to the New
8 Yorkers. I think they probably have a tougher, tighter
9 schedule than I do for getting back.

10 **MS. STEINGART:** We'd be grateful if we could make
11 flights that are between 1:30 or 2:00.

12 **THE COURT:** I'll get it done by noon.

13 **MR. QUSBA:** Your Honor, we'd rather get it approved
14 and take a later flight.

15 **(Laughter)**

16 **THE COURT:** I'm not able to negotiate that. I can't
17 do it.

18 All right. I'm going to start at 10:00 because, very
19 frankly, I'm pretty tired and I would like to clear my mind a
20 little bit and kind of start over with my notes.

21 Candidly, last night was like, sort of reminded me of
22 my trial days. I was thinking about this stuff. I don't know
23 how many -- do you ever get the pads by your bed just to take
24 down things or else you can't go to sleep? First time in 15
25 years that that happened and I want to avoid that tonight.

1 So, we will start at 10:00 and if anybody here -- if
2 you can't be here, that's fine. I mean, I understand that you
3 may have other commitments. I'm going to announce the
4 decision. There'll be a transcript. I'm not going to really
5 hear any argument, but just so I do have some questions I have
6 the primary counsel here that would be sufficient and I think
7 we can go from there. And I thank you all very much.

8 **THE CLERK:** All rise.

9 **(Proceeding was adjourned at 7:55 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in cursive script, appearing to read "Toni Hudson", is written above a horizontal line.

Signed

June 7, 2010

Dated

TONI HUDSON, TRANSCRIBER